No. 16-466

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| Title: | Bristol-Myers Squibb Company, Petitioner<br>v.<br>Superior Court of California, San Francisco County, et al. |
| Docketed: | October 11, 2016 |
| Lower Ct: | Supreme Court of California |
| Case Numbers: | (S221038) |
| Decision Date: | August 29, 2016 |

Questions Presented

| DATE | PROCEEDINGS AND ORDERS |
|---|---|
| Oct 07 2016 | Petition for a writ of certiorari filed. (Response due November 10, 2016) |
| Oct 13 2016 | Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner and counsel for the respondents. |
| Nov 10 2016 | Brief amici curiae of Washington Legal Foundation, et al. filed. |
| Nov 10 2016 | Brief amicus curiae of Product Liability Advisory Council, Inc. filed. |
| Nov 10 2016 | Brief amici curiae of Chamber of Commerce of the United States, et al. filed. |
| Nov 10 2016 | Brief amicus curiae of Pharmaceutical Research and Manufacturers of America filed. |
| Nov 10 2016 | Brief amicus curiae of GlaxoSmithKline, LLC filed. |
| Nov 15 2016 | Order extending time to file response to petition to and including December 9, 2016. |
| Dec 07 2016 | Brief of respondents Superior Court of California, San Francisco County, et al. in opposition filed. |
| Dec 20 2016 | Reply of petitioner Bristol-Myers Squibb Company filed. |
| Dec 21 2016 | DISTRIBUTED for Conference of January 6, 2017. |
| Jan 09 2017 | DISTRIBUTED for Conference of January 13, 2017. |
| Jan 17 2017 | DISTRIBUTED for Conference of January 19, 2017. |
| Jan 19 2017 | Petition GRANTED. |
| Feb 13 2017 | Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Petitioner. |
| Feb 13 2017 | Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Respondents. |
| Feb 17 2017 | SET FOR ARGUMENT ON Tuesday, April 25, 2017 |
| Feb 24 2017 | Record requested from the Supreme Court of California. |
| Mar 01 2017 | Joint appendix filed. (Statement of costs filed.) |
| Mar 01 2017 | Brief of petitioner Bristol-Myers Squibb Company filed. |
| Mar 02 2017 | Record received from the Supreme Court of California (1 box). |
| Mar 07 2017 | Brief amicus curiae of DRI-The Voice of the Defense Bar filed. |
| Mar 08 2017 | Brief amicus curiae of GlaxoSmithKline LLC filed. |
| Mar 08 2017 | Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. |
| Mar 08 2017 | Brief amicus curiae of Pharmaceutical Research and Manufacturers of America filed. |

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| Mar 08 2017 | Brief amicus curiae of Product Liability Advisory Council, Inc. filed. |
| Mar 08 2017 | Brief amici curiae of Atlantic Legal Foundation, et al. filed. |
| Mar 08 2017 | Brief amici curiae of Washington Legal Foundation, et al. filed. |
| Mar 08 2017 | Brief amicus curiae of United States filed. |
| Mar 08 2017 | Brief amici curiae of Reporters Committee for Freedom of the Press and Texas Association of Broadcasters filed. |
| Mar 09 2017 | Motion for leave to file amici brief out of time filed by TV Azteca, S.A.B. de C.V., et al. |
| Mar 09 2017 | Motion for leave to file amicus brief filed out of time by MoneyMutual LLP. |
| Mar 22 2017 | CIRCULATED. |
| Mar 27 2017 | Motion for leave to file amici brief out of time filed by TV Azteca, S.A.B. de C.V., et al. GRANTED. |
| Mar 30 2017 | Brief amicus curiae of Alan B. Morrison filed. (Distributed) |
| Mar 31 2017 | Brief of respondents Superior Court of California, San Francisco County, et al. filed. (Distributed) |
| Apr 03 2017 | Motion for leave to file amicus brief out of time filed by MoneyMutual LLP GRANTED. |
| Apr 05 2017 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Apr 05 2017 | Brief amicus curiae of The Center for Auto Safety filed. (Distributed) |
| Apr 07 2017 | Brief amicus curiae of Attorneys Information Exchange Group filed. (Distributed) |
| Apr 07 2017 | Brief amicus curiae of California Constitution Center filed. (Distributed) |
| Apr 07 2017 | Brief amicus curiae of The American Association for Justice filed. (Distributed) |
| Apr 07 2017 | Brief amici curiae of Professors of Civil Procedure and Federal Courts filed. (Distributed) |
| Apr 07 2017 | Brief amicus curiae of Public Justice, P.C. filed. (Distributed) |
| Apr 07 2017 | Brief amicus curiae of Asbestos Disease Awareness Organization filed. (Distributed) |
| Apr 07 2017 | Brief amici curiae of Civil Procedure Professors filed. (Distributed) |
| Apr 11 2017 | Response of respondents to motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Apr 12 2017 | Reply of Acting Solicitor General to respondents' response to motion filed. |
| Apr 13 2017 | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Gorsuch took no part in the consideration or decision of this motion. |
| Apr 18 2017 | Reply of petitioner Bristol-Myers Squibb Company filed. (Distributed) |
| Apr 25 2017 | Argued. For petitioner: Neal K. Katyal, Washington, D. C.; and Rachel P. Kovner, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Thomas C. Goldstein, Bethesda, Md. |
| Jun 19 2017 | Judgment REVERSED and case REMANDED. Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, Ginsburg, Breyer, Kagan, and Gorsuch, JJ., joined. Sotomayor, J., filed a dissenting opinion. |
| Jul 21 2017 | MANDATE ISSUED. |
| Jul 21 2017 | JUDGMENT ISSUED. |
| Aug 07 2017 | Record from the Supreme Court of California has been returned. |

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RECORD AND BRIEFS

16-466

No. 16-

Supreme Court, U.S.
FILED
OCT - 7 2016
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the California Supreme Court**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Due Process Clause permits a state court to exercise specific jurisdiction over a defendant only when the plaintiff's claims "arise out of or relate to" the defendant's forum activities. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted). The question presented is:

Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims—that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts.

## PARTIES TO THE PROCEEDING

1. Bristol-Myers Squibb Company, petitioner on review, was a defendant in the trial court and petitioner below.

2. The Superior Court of California for the County of San Francisco, respondent on review, was the respondent below.

3. The following individuals, respondents on review, were plaintiffs in the trial court and the real parties in interest below: Jean A. Bookout, Dana A. Crawford, Cedric A. Creeks, Lara A. Ellis, Dorothy A. Emerson-Evans, James A. Gogerty, William A. Greene, Kathleen A. Herman, Ruth A. Konopka, Patrick A. Mcclelland, Velva A. Neeley, Barbara A. Tabbs, James A. Thomas, Shirley A. Tincher, John A. Tomlinson, Rex A. Victory, Elizabeth A. White, Richard A. White, Lorraine Adams, Francis W. Adams, Beverley Adams, Theodore Adams, Gwendolan E. Ailes, Ricky L. Alexander, George Allen, Marie Alvin, Michael Alvin, Cheryl Anders, Judy Anderson, Bracy Anderson, David E. Andrews, Beverly R. Andrews, June M. Angel, Georgia Ann Burgin, Ronald A. Arcaroli, Eileen J. Armstrong, Stanley B. Kowaleski, Teresa B. McClelland, Thomas B. Morrison, Willie B. Thomas, James B. Watson, Thomas Badell, Beulah Baham, Charlie Baker, Faye Baker, Hinton Barnes, Brenda Beach, Michael R. Beaton, Pauline Beaton, Mary Beattie, Laura Beavers, James Beavers, Allen Bell, John Bell, Robert Bennet, Sandra Bennet, Mary Lou Bingham, Brenda Boatwright, Timothy A. Bolyard, Joyce Boone, David Booth, Paula Booth, Jacqueline Boston, Charles Botkin, Barbara Botkin, Charlie Bowie, Deborah Boyles, Donald Bradford, Constance R. Branch,

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## RULE 29.6 DISCLOSURE STATEMENT

Bristol-Myers Squibb Company has no parent corporation and no publicly held company owns 10% or more of Bristol-Myers Squibb Company's stock.

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IN THE

# Supreme Court of the United States

No. 16-

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the California Supreme Court**

## PETITION FOR A WRIT OF CERTIORARI

Bristol-Myers Squibb Company (Bristol-Myers) respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court in this case.

## OPINIONS BELOW

The California Supreme Court's opinion (Pet. App. 1a-90a) is reported at 377 P.3d 874. The California Court of Appeal's decision denying Bristol-Myers's petition for a writ of mandate (Pet. App. 91a-146a) is reported at 175 Cal. Rptr. 3d 412. The California Superior Court's opinion (Pet. App. 147a-150a) denying Bristol-Myers's motion to quash service of the summons is unreported.

## JURISDICTION

The California Supreme Court entered judgment on August 29, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257(a). *See Madruga* v. *Super. Ct.*, 346 U.S. 556, 557 n.1 (1954) (the California Supreme Court's disposition of a writ petition is a final judgment under 28 U.S.C. § 1257(a)); *Burnham* v. *Super. Ct.*, 495 U.S. 604, 608 (1990) (reviewing a California appellate court's personal-jurisdiction holding following the court's denial of a writ of prohibition).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

California Code of Civil Procedure § 410.10 provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

## INTRODUCTION

In the 4-3 decision below, the California Supreme Court held that Bristol-Myers could be haled into the California courts on respondents' product-defect claims relating to a drug that was not manufactured or designed in California, whose marketing, packaging, and regulatory materials were not prepared in California, and that was not prescribed to, dispensed to, or ingested by respondents in California. Indeed,

the majority did not dispute that respondents' "claims would be exactly the same if [Bristol-Myers] had no contact whatsoever with California." Pet. App. 29a. Nonetheless, applying a "sliding scale approach" to personal jurisdiction, the court concluded that because Bristol-Myers marketed and sold the same drug to *other* people in California, and conducted research on *other* products in California, its contacts with the State were sufficiently "wide ranging" to justify the assertion of specific jurisdiction over claims that bore a less direct "connection" to the State. *Id.* at 29a, 32a (citation omitted).

That is not how specific jurisdiction works. This Court has emphasized time and again that specific jurisdiction lies only when "the defendant's *suit-related conduct* * * * create[s] a substantial connection with the forum State." *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 (2014) (emphasis added). It is *general* jurisdiction that exists based on "contacts [with] no apparent relationship to the [injury] that gave rise to the suit," and then only when they are sufficiently "continuous and systematic" to render the defendant "at home." *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 757 (2014) (citation omitted). Applying this straightforward distinction five years ago in *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915 (2011), the Court held that where a plaintiff's injury occurred abroad, and the product "alleged to have caused the accident was manufactured and sold abroad," North Carolina courts "lacked specific jurisdiction to adjudicate the controversy." *Id.* at 919. That holding should have resolved this case, and no amount of forum-state contacts unrelated to respondents' suit should alter that fact.

Yet California, joined by a persistent minority of courts, has resolutely resisted the Court's guidance. For decades—ever since the Court described the "relatedness" requirement for specific jurisdiction in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408 (1984)—the California Supreme Court has been one of several state high courts, along with the Federal Circuit, to maintain that plaintiffs may obtain specific jurisdiction over a defendant even where there is *no* causal relationship between the defendant's forum-state contacts and the plaintiff's suit, provided that some nebulous "connection" exists between the contacts and the subject of the plaintiff's claims. The vast majority of courts have rejected that interpretation of the relatedness requirement, concluding that it unacceptably blurs the line between general and specific jurisdiction embodied in *Daimler* and this Court's other personal-jurisdiction cases. But the split endures, and it has resulted in not only widely divergent results in cases like this one, but also an unacceptable divide between the state and federal courts in California itself.

The Court's intervention is required to resolve the dispute. It should grant the writ, clarify that specific jurisdiction requires a causal connection between the defendant's forum contacts and the claim alleged, and reverse the decision below.

## STATEMENT

1. Bristol-Myers is a global biopharmaceutical company incorporated in Delaware and headquartered in New York. Pet. App. 4a. Bristol-Myers manufactures Plavix, a prescription drug that helps prevent strokes, heart attacks, and other cardiovascular problems by inhibiting blood clots. *Id.* at 2a.

As a national company, Bristol-Myers markets and sells its products—including Plavix—in California. Pet. App. 5a. Between 2006 and 2012, Bristol-Myers sold 187 million Plavix pills in the State for $918 million in revenue. *Id.* These sales constituted only 1.1 percent of its total national sales revenue. *Id.* Also like many companies of its size, Bristol-Myers has operations in California to support its research and sales missions. *Id.* Bristol-Myers has five California offices—four research facilities and a small government-affairs office—employing 164 people, as well as 250 California sales representatives. *Id.*; Cal. R. 428. These just-over-400 employees, however, are only a fraction of Bristol-Myers's global workforce. By comparison, Bristol-Myers has 6,475 employees in just the New York-New Jersey metropolitan area. Pet. App. 4a.

2. Respondents are 575 non-California residents.[1] Pet. App. 1a; Cal. R. 1-16. They joined 86 California residents in suing Bristol-Myers and McKesson Corporation, a California-based Plavix distributor, in the San Francisco Superior Court on individual product-defect claims. Pet. App. 2a. Each respondent alleges that Bristol-Myers negligently and wrongfully designed, developed, manufactured, tested, packaged, promoted, marketed, distributed, labeled, and sold Plavix by misrepresenting the drug's safety and efficacy. *Id.* at 3a. Each respondent further claims to have suffered severe side-effects

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[1] The decision below slightly overstated the number of Bristol-Myers research facilities and the number of respondents. *Compare* Pet. App. 1a, 5a, *with* Cal. R. 1-16, 428. But the precise numbers are irrelevant.

from Plavix, and each asserts various California product-liability causes of action. *Id.* at 3a-4a.

Bristol-Myers moved to quash service of respondents' summons and to dismiss respondents' claims for lack of personal jurisdiction. Pet. App. 4a; *see* Cal. Civ. Code § 418.10(a)(1). Respondents' claims, Bristol-Myers pointed out, had no link to the company's California activities. Pet. App. 4a. Respondents were not injured by Plavix in California. *Id.* Respondents were not treated in California. *Id.* Respondents were not prescribed Plavix by California doctors, did not have their Plavix prescription filled by California pharmacies, and did not receive Plavix distributed by McKesson from California. *Id.* at 46a-47a (Werdegar, J., dissenting). Moreover, Bristol-Myers did not research Plavix at its California laboratories and did not manufacture Plavix in the State. *Id.* at 4a-5a (majority op.). And Plavix's packaging, regulatory, advertising, and marketing materials were not produced in California. *Id.* at 5a. Bristol-Myers's contacts with California played no role in respondents' claims; their claims would have been the same even if Bristol-Myers had no contact at all with California. *Id.* at 29a, 33a-34a.

The trial court denied Bristol-Myers's motion, holding that the company was subject to general jurisdiction in California because it had "wide-ranging, continuous, and systematic activities in California." Pet. App. 150a. Bristol-Myers petitioned for a writ of mandate, *see* Cal. Civ. Code § 418.10(c), which the California Court of Appeal denied. Pet. App. 91a-146a. The Court of Appeal disagreed that Bristol-Myers was subject to general jurisdiction in California. *Id.* at 112a. But it held that respondents'

claims were sufficiently related to Bristol-Myers's California activities so as to support specific jurisdiction. *Id.* at 113a-142a.

3. The California Supreme Court affirmed in a 4-3 decision. Pet. App. 1a-90a.

a. The majority agreed with Bristol-Myers that it was not subject to general jurisdiction in California. Pet. App. 9a-19a. Applying *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915 (2011), and *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014), the majority held that Bristol-Myers was not "at home" in the State. Pet. App. 16a-19a. Bristol-Myers was not incorporated or headquartered in California—the two paradigm places for general personal jurisdiction. *Id.* at 16a. And Bristol-Myers's California activities, though significant, were not so significant in comparison to its activities elsewhere as to make Bristol-Myers at home in the State. *Id.* at 17a-18a.

The majority nonetheless held that Bristol-Myers was subject to specific jurisdiction on respondents' claims. Pet. App. 20a-44a. Two decades ago, in *Vons Cos., Inc.* v. *Seabest Foods, Inc.*, 926 P.2d 1085 (Cal. 1996), the California Supreme Court adopted a "sliding scale" to measure relatedness. Pet. App. 32a. As its name suggests, the sliding scale views "the intensity of [the defendant's] forum contacts and the connection of the [plaintiff's] claim to those contacts a[s] inversely related." *Id.* at 25a (citation omitted). That is, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Id.* (citation omitted). Critically, under the sliding scale, "[a] claim need not arise directly from the defendant's forum contacts in order to be suffi-

ciently related to the contact to warrant the exercise of specific jurisdiction," nor do the defendant's forum contacts "need [to] be either the proximate cause or the 'but for' cause of the plaintiff's injuries." *Id.* at 22a (citation omitted).

Applying the sliding scale, the majority found that Bristol-Myers's general business activities in the State were sufficient to subject the company to specific jurisdiction on respondents' claims. Pet. App. 27a-34a. It held that Bristol-Myers's "nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between [respondents'] claims and the company's contacts in California concerning Plavix" because even though respondents did not allege that *they* ingested Plavix that was marketed, promoted, or distributed in California, their "claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state." *Id.* at 28a. The majority further found that Bristol-Myers's "research and development activity in California provides an additional connection between [respondents'] claims and the company's activities in California," even though "there is no claim that Plavix itself was designed and developed in these facilities." *Id.* at 29a.

b. Justice Werdegar, joined by Justices Chin and Corrigan, dissented. Pet. App. 46a-87a.

The dissent agreed that Bristol-Myers was not subject to general jurisdiction in California. Pet. App. 46a. But the dissenters strongly disagreed that respondents' claims were related to Bristol-Myers's California activities. The majority's contrary conclu-

sion, they explained, "is not supported by specific jurisdiction decisions from the United States Supreme Court * * * or the lower federal and state courts." *Id.* at 49a. They emphasized that the majority's decision "undermines [the] essential distinction between specific and general jurisdiction." *Id.* at 50a. If the relatedness requirement is met merely because a defendant engaged in nationwide conduct—such that the conduct at issue in a plaintiff's claims is similar to conduct that also allegedly occurred in California—that would "expand[ ] specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction." *Id.* And that result eviscerates the limits on general jurisdiction that this Court articulated in *Daimler*. As the dissent explained, what this Court "wrought in *Daimler*—a shift in the general jurisdiction standard from the 'continuous and systematic' test * * * to a much tighter 'at home' limit—[the majority] undoes today under the rubric of specific jurisdiction." *Id.* at 50a-51a.

This petition followed.

## REASONS FOR GRANTING THE PETITION

### I. THERE IS A DEEP AND ACKNOWLEDGED SPLIT ON THE STANDARD FOR RELATEDNESS.

The California Supreme Court's decision exacerbates a well-established conflict over when a plaintiff's suit is sufficiently connected to the defendant's contacts with the forum State to expose the defendant to specific jurisdiction. Nine circuits have held that a plaintiff's suit does not "relate to or arise out of" a defendant's forum-state contacts unless those

contacts in some way *caused* the plaintiff's injury. Two of those circuits reached that conclusion in pharmaceutical product-defect cases presenting facts materially indistinguishable from those in this case. But the California Supreme Court—joined by the Federal Circuit and the high courts of Texas and the District of Columbia—disagrees: It holds that a defendant is subject to specific jurisdiction even if the plaintiff would have suffered precisely the same injuries had the defendant never made contact with the forum. That is wrong, and the enduring division on this question is intolerable. In California, for instance, different relatedness rules govern in federal and state courts—enabling jurisdictional gamesmanship by plaintiffs and destroying predictability for entities that do business in the State.

1. The lower courts' confusion regarding relatedness traces to *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408 (1984). There, the Court explained that specific jurisdiction exists only "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum." *Id.* at 414. Because the parties had not briefed the issue, however, the Court "decline[d] to reach" the question of "what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists." *Id.* at 415 n.10. The Court has often repeated the "arising out of or related to" requirement in the three decades since *Helicopteros*, but it has never expressly answered the question left open in that case. *See, e.g.*, *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 881 (2011) (plurality op.); *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 473 n.15 (1985).

Left to their own devices, the lower courts have failed to settle on an answer. Instead, courts have divided into—and have acknowledged that they have divided into—three camps. *See Oldfield* v. *Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222 n.32 (11th Cir. 2009) (acknowledging that "[o]ther courts have developed" different "approaches for answering the relatedness question" and that "three predominate"); *Dudnikov* v. *Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (similar); *Moki Mac River Expeditions* v. *Drugg*, 221 S.W.3d 569, 579-580 (Tex. 2007) (similar); *Shoppers Food Warehouse* v. *Moreno*, 746 A.2d 320, 333-335 (D.C. 2000) (en banc) (similar).

But-For Cause. One group of courts, which includes the Fourth, Ninth, and Tenth Circuits and the highest state courts of Arizona, Massachusetts, and Washington, has concluded that the relatedness requirement is satisfied only if the defendant's forum-state conduct is a "but for" cause of the plaintiff's injury. Thus, these courts hold that a plaintiff cannot establish personal jurisdiction over a defendant unless he "show[s] that he would not have suffered an injury 'but for' [the defendant's] forum-related conduct." *Menken* v. *Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007); *see Consulting Eng'rs Corp.* v. *Geometric Ltd.*, 561 F.3d 273, 278-279 (4th Cir. 2009) (holding that relatedness "requires that the defendant's contacts with the forum state form the basis of the suit"); *Dudnikov*, 514 F.3d at 1079 (10th Cir.) (stating that a defendant's contacts must be "a but-for cause of th[e] action"); *Williams* v. *Lakeview Co.*, 13 P.3d 280, 284-285 (Ariz. 2000) (requiring "a causal nexus between the defendant's * * * activities and the plaintiff's claims"); *Tatro* v. *Manor Care, Inc.*, 625

N.E.2d 549, 553 (Mass. 1994) (adopting "a 'but for' test"); *Shute* v. *Carnival Cruise Lines*, 783 P.2d 78, 81-82 (Wash. 1989) (en banc) ("We adopt the 'but for' test.").[2]

Courts that take this approach have reasoned that "[t]he 'but for' test is consistent with the basic function of the 'arising out of' requirement—it preserves the essential distinction between general and specific jurisdiction." *Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991). In direct contrast with the sliding-scale approach employed below, courts applying but-for causation ask whether "[i]n the absence of [the defendant's forum-related] activity, the * * * [plaintiff's] injury would not have occurred." *Id.* at 386; *see Kuenzle* v. *HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 456-457 (10th Cir. 1996) (similar); *cf.* Pet. App. 29a (acknowledging that respondents' "claims would be exactly the same if [Bristol-Myers] had no contact whatsoever with California").

Proximate Cause or Foreseeability. A second group of courts has concluded that the relatedness requirement demands something more than "but for" causation, although they have not settled on the precise standard. Two circuits—the First and the

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[2] Two of these courts—the Tenth Circuit and the Arizona Supreme Court—have declined to decide whether plaintiffs must also show proximate cause to establish specific jurisdiction. *See Dudnikov*, 514 F.3d at 1078-79 ("As between the * * * but-for and proximate causation tests, we have no need to pick sides today."); *Williams*, 13 P.3d at 283-284 ("Even under the more liberal 'but for' test, * * * the plaintiffs here cannot establish the required nexus.").

Sixth—have said that a plaintiff's injuries must be "proximately caused" by the defendant's forum-state contacts. As the First Circuit has explained, "[a] 'but for' requirement * * * has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." *Harlow* v. *Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) (quoting *Nowak* v. *Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996)). Hence, in its view "due process demands something like a 'proximate cause' nexus," which "correlates to foreseeability, a significant component of the jurisdictional inquiry." *Id.* (citations omitted). The Sixth Circuit has agreed, explaining that "more than mere but-for causation is required to support a finding of personal jurisdiction," particularly given that "the Supreme Court has emphasized that only consequences that *proximately* result from a party's contacts with a forum state will give rise to jurisdiction." *Beydoun* v. *Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2014) (citing *Burger King Corp.*, 471 U.S. at 474).

The Third, Seventh, and Eleventh Circuits, as well as the Oregon Supreme Court, have reached a similar conclusion, although they have refrained from using the term "proximate cause." These courts agree that specific jurisdiction "requires a closer and more direct causal connection than that provided by the but-for test." *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007); *see, e.g.*, *uBID, Inc.* v. *GoDaddy Grp., Inc.*, 623 F.3d 421, 430 (7th Cir. 2010) (explaining that "[b]ut-for causation would be 'vastly overinclusive,' haling defendants into court in the forum state even if they gained nothing from those contacts"). But they have declined to adopt a

"mechanical" formula for describing the causation standard; rather, each has said that it conducts a "fact-sensitive" inquiry to determine whether the assertion of jurisdiction is "intimate enough to keep * * * personal jurisdiction reasonably foreseeable." *O'Connor*, 496 F.3d at 323; *see uBID*, 623 F.3d at 430 (same); *Oldfield*, 558 F.3d at 1222-23 (11th Cir.) (stating that "the contact must be a 'but-for' cause of the tort" as well as a "a foreseeable consequence" of the defendant's conduct); *Robinson* v. *Harley-Davidson Motor Co.*, 316 P.3d 287, 300 (Or. 2013) (en banc) ("[T]he activity may not be only a but-for cause of the litigation; rather, the nature and quality of the activity must also be such that the litigation is reasonably foreseeable by the defendant."). In all of these courts, too, specific jurisdiction is lacking unless "the plaintiff would not have been injured" had there been no "contacts between the defendant and the forum state." *Nowak*, 94 F.3d at 712.

No Causal Connection. In sharp contrast with these first two sets of courts, the California Supreme Court, the Federal Circuit, and the highest courts of Texas and the District of Columbia have concluded that the relatedness requirement does not demand any causal connection between the defendant's contacts and the plaintiff's injury. Rather, they have held that it is enough if there is some general "relationship" or "connection" between the two—and that such a nexus can be found even if the plaintiff's injury would have occurred had the defendant never made contact with the forum.

The California Supreme Court articulated this approach quite clearly in the decision below. It

explained that, under its sliding-scale test, the defendant's "activities in the forum state need not be either the proximate cause or the 'but for' cause of the plaintiff's injuries." Pet App. 22a. It required much less, describing the pertinent question as whether "there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim." *Id.* at 21a (quoting *Snowney* v. *Harrah's Entm't, Inc.*, 112 P.3d 28, 36-37 (Cal. 2005)).

The Federal Circuit, the Texas Supreme Court, and the District of Columbia Court of Appeals have adopted similar tests. The Federal Circuit has said that it considers whether the defendant's conduct "relate[s] in some material way" to the plaintiff's suit—a standard it says is "far more permissive than either the 'proximate cause' or the 'but for' analyses." *Avocent Huntsville Corp.* v. *Aten Int'l Co.*, 552 F.3d 1324, 1336-37 (Fed. Cir. 2008). The Texas Supreme Court has likewise said that its "standard does not require proof that the plaintiff would have no claim 'but for' the contacts, or that the contacts were a 'proximate cause' of the liability." *TV Azteca* v. *Ruiz*, 490 S.W.3d 29, 52-53 (Tex. 2016). And the D.C. Court of Appeals has rejected "strict causation-based tests" in favor of a test requiring only "a 'discernible relationship' between [the plaintiff's] claim and the" defendant's conduct. *Shoppers Food Warehouse*, 746 A.2d at 333, 336 (citation omitted).

Courts on every side of the split recognize the significance of the choice between these three standards. Nearly every court that has adopted a but-for or proximate-causation standard has expressly rejected the sliding scale, calling it "formless,"

*O'Connor*, 496 F.3d at 322; a way of "inappropriately blur[ring] the distinction between specific and general personal jurisdiction," *Dudnikov*, 514 F.3d at 1078; or "a freewheeling totality-of-the-circumstances test," *Robinson*, 316 P.3d at 291 (citation omitted). Courts that have adopted non-causal tests have, conversely, criticized the causation standards as "overly mechanical," *Vons*, 926 P.2d at 468-469, and insufficiently "permissive," *Avocent*, 552 F.3d at 1337.

2. These different tests have produced divergent results in suits materially indistinguishable from this one: that is, product-liability claims against drug manufacturers based on injuries from a drug that was not manufactured, prescribed, or ingested in the forum State. Both the First and Fourth Circuits have dismissed such claims for lack of personal jurisdiction; only California's non-causative, sliding-scale approach leaves defendants subject to personal jurisdiction as the price of generally doing business in California.

Consider the First Circuit's decision in *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 214 (1st Cir. 1984). In that case, as here, the plaintiff sued a drug manufacturer, Eli Lilly, for injuries alleged caused by a drug it manufactured. Lilly advertised that drug in the forum State, employed sales representatives in the forum State, sold the drug through wholesalers in the forum State, and marketed the drug nationwide. *Id.* at 214-215. Nonetheless, the First Circuit concluded that these generalized contacts could not establish personal jurisdiction. The plaintiff's injuries, it explained, had been "caused" in another State, where the drug had been "purchased and

consumed"; accordingly, her cause of action "did not arise from Lilly's [forum-state] activities." *Id.* at 216. Exercising jurisdiction in this circumstance, the court concluded, would "comport[] with neither logic nor fairness," as it would allow any "nonresident injured out of state by a drug sold and consumed out of state" to bring suit against Lilly in the forum. *Id.* at 216 n.4

The Fourth Circuit reached a similar conclusion in *Ratliff* v. *Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir. 1971). In that case, a plaintiff sued two manufacturers for injuries caused by a drug that was "neither manufactured nor consumed in" the forum State. *Id.* at 746. The defendants, like Bristol-Myers, conducted a range of activities in the forum State, including advertising, solicitation, and employing several sales representatives. *Id.* Yet because "the causes of action arose outside the forum and were unconnected with the defendant's activities" in the forum, the court concluded, there was no "rational nexus" to support jurisdiction. *Id.* at 747-748.

The California Supreme Court reached a different conclusion. Unlike the First and Fourth Circuits, the court dismissed as irrelevant the fact that respondents (according to their own allegations) did not purchase Plavix in California, did not obtain Plavix from a California distributor, and did not learn of Plavix through California-based advertising. *See* Pet App. 33a-34a (acknowledging that the respondents "did not suffer any Plavix-related injuries in the state"); *id.* at 47a-48a (Werdegar, J., dissenting). Indeed, the court did not contest that respondents' "claims would be exactly the same if [Bristol-Myers]

had no contact whatsoever with California." *Id.* at 29a. Nonetheless, the California Supreme Court found that personal jurisdiction over Bristol-Myers existed because it ultimately distributed Plavix to respondents "as part of a common nationwide course of distribution" that also included California residents. *Id.* at 28a. The court reasoned that such nationwide distribution meant that "the nonresident plaintiffs' claims bear a *substantial connection* to [Bristol-Myers's] contacts in California." *Id.* (emphasis added).

These claims would have been dismissed in any federal circuit or state court that applies a causation standard—indeed, materially similar claims *were* dismissed in circuits that do. And the California Supreme Court acknowledged as much: Confronted with the observation that its decision was irreconcilable with *Glater*, it responded that the First Circuit's decision differed because that court does not apply a "sliding scale approach to specific jurisdiction." Pet App. 32a; *see also id.* at 62a-64a (Werdegar, J., dissenting) (noting conflict with both *Glater* and *Ratliff*). That is right, and it underscores the need for this Court's review. Disagreements over the test for relatedness, and not differences in facts, are driving differences in outcomes among the lower courts.

3. Permitting this division to persist is especially intolerable in California, where the state Supreme Court and the relevant federal circuit have adopted divergent jurisdictional tests. As noted above, "the Ninth Circuit follows the 'but for' test" in applying the relatedness prong. *Menken*, 503 F.3d at 1058 (citation omitted). Under that test, it has repeatedly

rejected assertions of personal jurisdiction premised on in-state marketing and sales activities that are not a cause of the plaintiff's injuries. *See, e.g.*, *Young* v. *Actions Semiconductor Co.*, 386 F. App'x 623, 627 (9th Cir. 2010) (finding that the court lacked personal jurisdiction over a securities claim, notwithstanding that the defendant had "market[ed] and s[old] its stock in connection with [its] IPO" in California, because the plaintiffs "would have [had] the same claims * * * even if" the California-based sales and marketing had not occurred); *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1119 (9th Cir. 2002) (similar). A federal district court in California would thus have readily dismissed respondents' claims because they would have "be[en] exactly the same if [Bristol-Myers] had no contact whatsoever with California." Pet. App. 29a.

That cannot be allowed. If jurisdictional outcomes vary based on whether a claim is filed in state or federal court, then plaintiffs will have every reason to—and will—find ways to shop their claims to the more hospitable courthouse. Lawyers can do that with ease: one well-worn method is to add an extra defendant who destroys complete diversity, as may have occurred in this case. *See* Pet App. 59a (Werdegar, J., dissenting) ("Why plaintiffs sued McKesson as well as [Bristol-Myers] is not obvious * * * but at no point have [respondents] argued McKesson bore any responsibility in providing them with Plavix."). This Court has previously recognized that the costs of such a circuit-state conflict are particularly high where the conflict involves California, "the State with the largest population"; in this circumstance, it has said, there is "substantial reason for granting

certiorari under this Court's Rule 10" to eliminate the risk of "[f]orum shopping." *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992). The writ should be granted to settle the longstanding split on relatedness generally and to resolve the specific enticement to forum-shop presented by the divergent approaches taken by California and the Ninth Circuit.

## II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S SPECIFIC-JURISDICTION CASE LAW AND RENDERS *DAIMLER* A DEAD LETTER FOR NATIONAL CORPORATIONS DOING BUSINESS IN CALIFORNIA.

The California Supreme Court's sliding-scale approach to relatedness and its application to respondents' claims cannot be squared with this Court's specific-jurisdiction case law. And it retains the old "continuous and systematic" standard for general jurisdiction by labeling it specific jurisdiction instead. That renders *Daimler* a dead letter for any company that does substantial business in California or markets its products nationally.

### A. The California Supreme Court's Decision Conflicts With *Goodyear* And This Court's Past Pronouncements Regarding Relatedness.

1. The California Supreme Court's sliding-scale approach and its application to respondents' claims contradict this Court's past pronouncements regarding relatedness. Although the Court has phrased the requirement differently in different cases, it has always required a causal connection between the plaintiff's claims and the defendant's forum activities.

Start with the Court's "pathmarking," *Goodyear*, 564 U.S. at 919, decision in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). The relatedness test was satisfied because of a causal link between the defendant's in-state activities and the plaintiff's claims; "[t]he obligation which [was] here sued upon arose out of th[e] [defendant's] very activities" in the State. *Id.* at 320. That circumstance is in sharp contrast with respondents' claims, which, as the majority below conceded, do not arise out of Bristol-Myers's very activities in California. *See* Pet. App. 30a.

The Court in *Goodyear* similarly observed that specific jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that *takes place in the forum State* and is therefore subject to the State's regulations." 564 U.S. at 919 (brackets in original; emphasis added; citation omitted). Not just any activity in the forum State will do. Specific jurisdiction is proper only if *"that activity gave rise to the episode-in-suit."* *Id.* at 923 (emphasis in original). And contrary to the majority below, *Goodyear* requires that link even where the defendant has "continuous and systematic" contacts with the forum. *Id.* (citation omitted); *cf.* Pet. App. 30a (rejecting the argument that Bristol-Myers's "forum contacts must bear some substantive legal relevance to [respondents'] claims" because Bristol-Myers's "contacts with California are substantial").

Finally, in *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014), the Court explained that "[f]or a State to exercise jurisdiction consistent with due process, the defendant's *suit-related conduct* must create a *substantial*

*connection* with the forum State." *Id.* at 1121 (emphases added). Because the California Supreme Court could not point to any "suit-related conduct" by Bristol-Myers bridging the divide between respondents' claims and the company's contacts with California, its analysis instead treated as relevant general business conduct in California and conduct related to the claims of California-resident plaintiffs. Elevating such non-suit-related conduct to prominence conflicts with *Walden*.

This Court has applied these principles throughout its specific-jurisdiction case law. Each time that the Court has found the exercise of specific jurisdiction over a defendant consistent with due process, there was some causal link between the defendant's acts in the forum and the cause of action that the plaintiff asserted. *See, e.g.*, *Burger King*, 471 U.S. at 479-480 (Florida court could exercise specific jurisdiction over defendant because franchise dispute "grew directly out of" a contract formed in Florida); *Calder* v. *Jones*, 465 U.S. 783, 789 (1984) (California court could exercise specific jurisdiction over defendants because defendants' tortious actions "were expressly aimed" at California); *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 776-777 (1984) (New Hampshire could exercise specific jurisdiction over defendant because defendant's sale of magazines in New Hampshire injured plaintiff's reputation there); *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (California could exercise specific jurisdiction over defendant because defendant delivered plaintiff's life-insurance contract in California and plaintiff's suit was based on the contract); *see also* Pet. App. 53a-54a (Werdegar, J., dissenting) ("Of the post-*International Shoe* decisions in which the high court actually found a

factual basis for specific jurisdiction, each featured a direct link between forum activities and the litigation."). The California Supreme Court's forthrightly non-causal test conflicts with these cases.

The majority below at times suggested that there was a sufficient connection between respondents' claims and Bristol-Myers's California activities because the company supposedly had a national Plavix marketing strategy. *See* Pet. App. 33a, 35a. That is plainly incorrect. A contact has "no jurisdictional significance" if it would result in jurisdiction "in all 50 States and the District of Columbia * * * simultaneously." *Rush* v. *Savchuk*, 444 U.S. 320, 330 (1980). Under the majority's approach, the allegation of a national marketing strategy would subject a defendant to specific jurisdiction not just in California, but also in North Dakota, and Kansas, and every other state. This Court has sensibly forbidden such a high-level view of the relatedness requirement. *See id.*

2. In addition to conflicting with the general principles of relatedness in this Court's cases, the California Supreme Court's decision conflicts with *Goodyear* at a granular level. *Goodyear*, like this case, was a product-defect suit. 564 U.S. at 918. The plaintiffs claimed that a defective tire manufactured in Turkey and installed on a French bus caused the bus to overturn. *Id.* at 920. Plaintiffs alleged negligence in the tire's "design, construction, testing, and inspection," and sued the defendants, foreign subsidiaries of The Goodyear Tire & Rubber Company, in North Carolina state court. *Id.* at 918, 920 (citation omitted).

Although the Court focused primarily on general jurisdiction, it led off with a discussion of—and holding on—specific jurisdiction. *Id.* at 919. The Court explained that "[b]ecause the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy." *Id.* *Goodyear* thus states a simple rule for specific jurisdiction in a product-defect case: If the plaintiff is not injured in the forum and the allegedly defective product was not manufactured or sold in the forum, then there is no specific jurisdiction in the forum.

The majority below correctly described *Goodyear*'s specific-jurisdiction holding in the course of its general-jurisdiction discussion. Pet. App. 13a ("The high court first noted that North Carolina courts lacked specific jurisdiction to adjudicate the controversy because the accident had occurred abroad and the allegedly defective tire had been manufactured and sold abroad."). But the majority then never applied *Goodyear*'s specific-jurisdiction rule; it inexplicably never cited *Goodyear* in its section on specific jurisdiction. *Id.* at 20a-44a.

The dissent recognized that *Goodyear* controlled both the general and specific jurisdiction analyses. Pet. App. 53a (Werdegar, J., dissenting) (recognizing that, in *Goodyear*, "[n]one of the injury-causing events having occurred in the forum state, the basis for specific jurisdiction was lacking"). This Court should, too. Because respondents were not injured by Plavix in California and the Plavix they ingested was neither manufactured nor sold in California,

Bristol-Myers is not subject to specific jurisdiction on respondents' claims in California.[3]

### B. The California Supreme Court's Decision Guts *Daimler* For National Consumer Companies.

The California Supreme Court's sliding-scale approach does more than just contravene this Court's specific-jurisdiction precedent. It also guts *Daimler*'s limitations on general jurisdiction by resurrecting the old "continuous and systematic contacts" test for general jurisdiction under a new specific-jurisdiction label.

1. *Daimler* reaffirmed the essential distinction between general and specific jurisdiction. 134 S. Ct. at 754. And it made clear that the test for general jurisdiction is demanding. For there to be general jurisdiction over a corporation in a State, it must be

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[3] None of this is to say that a plaintiff suffering injury in the forum State is, by itself, sufficient to establish specific jurisdiction over a defendant. This Court has held that "mere injury to a forum resident is not a sufficient connection to the forum" and that "an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State." *Walden*, 134 S. Ct. at 1125. And lower courts have held that even where a product injures a plaintiff in the forum, there is no specific jurisdiction over the product's manufacturer if the product entered the State through forces outside the manufacturer's control. *See, e.g.*, *D'Jamoos* v. *Pilatus Aircraft Ltd.*, 566 F.3d 94, 106 (3d Cir. 2009); *Kuenzle*, 102 F.3d at 457; *Hinrichs* v. *Gen. Motors of Can., Ltd.*, __ So. 3d __, No. 1140711, 2016 WL 3461177, at *27 (Ala. June 24, 2016) (per curiam). But *Goodyear* at least marks specific jurisdiction's outer bounds: If there is no injury in the forum and no manufacture or sale of the injury-causing product in the forum, there can be no specific jurisdiction in the forum.

"essentially at home" there—not merely have continuous or systematic contacts there. *Id.* at 754, 760 (citation omitted). *Daimler* thus "raised the bar" for general jurisdiction and "emphasized that it should not lightly be found." *Kipp* v. *Ski Enter. Corp. of Wis., Inc.*, 783 F.3d 695, 698 (7th Cir. 2015).

The California Supreme Court below purported to follow *Daimler*'s stringent requirements for general jurisdiction. Both the majority and dissent agreed that Bristol-Myers was not essentially at home in California. *See* Pet. App. 16a-19a (majority); *id.* at 46a (dissent). But the majority effectively reimposed the old "doing business" test for general jurisdiction by calling it specific jurisdiction. It held that because Bristol-Myers distributed Plavix in California (to pharmacies other than respondents'), marketed Plavix in California (to people other than respondents), and researches and develops drugs in California (but not Plavix), a California court can exercise jurisdiction over Bristol-Myers to adjudicate Plavix-based claims that—in the majority's words—have no "substantive legal relevance" to any of these forum activities. *Id.* at 30a. But to exercise jurisdiction over a defendant on claims that have no substantive legal relevance to the forum is the definition of *general* jurisdiction. *See Walden*, 134 S. Ct. at 1121 n.6; *Daimler*, 134 S. Ct. at 751; *Goodyear*, 564 U.S. at 919.

*Daimler* proves as much. The Court offered the example of a California product-defect suit involving a Daimler-manufactured vehicle that overturned in Poland and injured a Polish driver and passenger. 134 S. Ct. at 751. The Court explained that the question in that case would be one of general juris-

diction; the suit could be maintained in California only if there were general jurisdiction over Daimler there. *Id.* at 754 n.5.

Under the decision below, however, *Daimler*'s Polish product suit could be brought in California. After all, Daimler there—like Bristol-Myers here—had extensive product sales in California and had several facilities that sold and promoted its brand. *See id.* at 752 (Daimler was the largest supplier of luxury vehicles to the California market and had a regional office, a classic-car center, and a vehicle-preparation center there). Given these extensive contacts, the sliding scale would not require a particularly close connection between the Polish plaintiffs' claims and Daimler's California contacts. *See* Pet. App. 22a. The majority below would therefore likely deem the Polish plaintiffs' claims connected to Daimler's sale, promotion, and preparation of allegedly defective vehicles in California and allow specific jurisdiction over Daimler on the plaintiffs' claims. That result turns *Daimler* on its head.

The majority claimed that its specific-jurisdiction holding was not equivalent to general jurisdiction because it was not subjecting Bristol-Myers to *all* possible claims in California. Pet. App. 34a-35a. But under the majority's view, an allegedly uniform, nationwide marketing strategy would be a contact with all 50 States that would subject Bristol-Myers to specific jurisdiction in each of them on all related claims from anywhere in the Nation. *But see Rush*, 444 U.S. at 330 (finding irrelevant a contact that would lead to personal jurisdiction in all 50 States simultaneously). So, Bristol-Myers is at the very least subject to specific jurisdiction in California on

all product-defect claims—the type of suit most likely to be brought against a manufacturer. And Bristol-Myers would be subject to specific jurisdiction on other claims in California, too. A disgruntled Bristol-Myers employee in Maine could sue for wrongful termination in California because Bristol-Myers employs workers in both California and Maine—particularly if the Maine employee claimed his termination was connected to a uniform Bristol-Myers human-resources policy. *See* Pet. App. 77a (Werdegar, J., dissenting) (proposing a similar hypothetical). Or a Bristol-Myers landlord in Nebraska could sue in California for back rent because Bristol-Myers also leases facilities in California—particularly if the Nebraska landlord claimed that the failure to pay was because of a centralized Bristol-Myers accounts-payable system. *See id.* If this is not general jurisdiction, then it is so close as to be functionally indistinguishable for national consumer companies like Bristol-Myers. *See id.*

## III. THE QUESTION PRESENTED IS IMPORTANT AND THIS CASE IS AN IDEAL VEHICLE TO ANSWER IT.

The relatedness question is an important one. This Court once granted review on the issue before declining to decide it, and the need for resolution has grown markedly since then. Practically speaking, leaving the decision below in place will result in California state courts becoming even more of a destination for plaintiffs looking to shop suits to friendlier forums. And this case is an ideal vehicle to address the relatedness question. The Court should step in to do so.

1. The Court has recognized the certworthiness of the relatedness question before. The Court granted review to determine the requisite causal connection for establishing relatedness in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 589-590 (1991), but ultimately decided the case on other, non-constitutional grounds. *See Tamburo* v. *Dworkin*, 601 F.3d 693, 708 (7th Cir. 2010) (recognizing that the Court granted review of the relatedness question in *Carnival* but did not reach it); *Akro Corp.* v. *Luker*, 45 F.3d 1541, 1547 (Fed. Cir. 1995) (same).

Not only has the split become far deeper and more entrenched since 1991, but specific jurisdiction has become a much more hotly contested issue in recent years. *Goodyear* and *Daimler* made clear that companies are not subject to general jurisdiction in every State just because they have substantial operations there. *See, e.g.*, William R. Hanlon & Richard M. Wyner, Mealey's Litigation Report: Asbestos, Daimler *Turns Two: Personal Jurisdiction Over Out-Of-State Mass Tort Defendants In The Wake Of* Daimler AG *v.* Bauman 1 (Apr. 13, 2016) ("Before 2014, most courts and litigants assumed that corporations are subject to general personal jurisdiction * * * in every state where they had continuous and systematic business contacts. That meant that large corporations could be sued in essentially any state on any claim."), https://goo.gl/Orp1fo. Since then, where companies are subject to specific jurisdiction—and the proper relatedness standard for such jurisdiction—has become a central issue for companies operating across state lines. The time has come for the Court to take up the question it did not resolve in *Carnival*.

2. Review is also practically important for corporate defendants. Left unchecked, the California Supreme Court's slippery sliding scale will rob corporate defendants of the predictability that the Due Process Clause is supposed to provide them. *See Burger King*, 471 U.S. at 472 ("[T]he Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980))). Businesses will be subject to suit in California state court anytime—in some trial judge's view—a defendant's not-causally-related forum conduct can be connected at a high level or in some abstract way to a plaintiff's claims. Short of pulling out of the California market altogether, a business can never know whether an in-state facility or activity will be the hook that allows the California Superior Court to exercise jurisdiction over a nationwide mass action. *Cf.* Pet. App. 33a (for Bristol-Myers to eliminate the risk of being haled into California courts on nationwide Plavix claims, it would need to "sever[] its connection with the state"); *id.* at 83a (Werdegar, J., dissenting) (under the majority's decision, "predictability has been severely impaired, as the company's potential liabilities cannot be forecast from its state activities").

The Court's review would moreover stop courts from avoiding *Daimler*'s restrictions on general jurisdiction through a specific-jurisdiction label. *Daimler*'s clear rule for where a corporation is "at home" increased certainty and reduced jurisdictional-discovery costs for national companies. *See Daimler*, 134 S. Ct. at 760, 762 n.20. If lower courts can revive general jurisdiction through a loose relatedness requirement like California's, *Daimler*'s predictability gains will be wiped out.

The California Supreme Court's sliding-scale approach is particularly harmful given the size and importance of the California market. California has the largest economy in the United States,[4] and the sixth largest in the world, *California Economy Surges to No. 6 in Global Rankings*, Sacramento Bee (June 14, 2016), https://goo.gl/3QqmPc. The practical reality is that every sizable national company likely has significant California connections. *See* Pet. App. 84a (Werdegar, J., dissenting) ("As California holds a substantial portion of the United States population, any company selling a product or service nationwide, regardless of where it is incorporated or headquartered, is likely to do a substantial part of its business in California."); *cf. Daimler*, 134 S. Ct. at 752 (California accounted for 2.4% of Daimler's worldwide sales). That, in turn, means that California state courts will not require much if any connection between the company's California activities and a plaintiff's non-California claims to exercise jurisdic-

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[4] Bureau of Economic Analysis, U.S. Dep't of Commerce, *Gross Domestic Product by State: First Quarter 2016* tbl.3 (July 27, 2016), https://goo.gl/p38627.

tion over the company. *See* Pet. App. 22a (requiring an inverse relationship between California contacts and connection with a plaintiff's claims under the sliding-scale approach). This Court has refused to allow California's outsized role in the Nation's economy to warp jurisdictional rules before. *See Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) (rejecting a plurality-of-contacts approach to determining a corporation's principal place of business because, under such a test, "nearly every national retailer—no matter how far flung its operations—will be deemed a citizen of California for diversity purposes") (citation omitted). It should refuse to do so again here.

3. The California Supreme Court's capacious understanding of specific jurisdiction will also allow plaintiffs to shop claims with no causal connection to a defendant's California activities to what their counsel view as the more plaintiff-friendly California courts. A survey of all pharmaceutical product-liability cases in the Los Angeles and San Francisco Superior Courts found that non-California plaintiffs predominated in 85.9% of complaints, that 89.9% of plaintiffs overall were from outside California, and that more than 67% of complaints did not have a single California plaintiff in the caption. Ryan Tacher, Civil Justice Ass'n of Cal., *Are Out-Of-State Plaintiffs Clogging California Courts?* (Sept. 2016), https://goo.gl/blEAyU. Plaintiffs should not be allowed to take their case to the most hospitable forum they can think of. *Cf. Walden*, 134 S. Ct. at 1122 ("Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties.").

4. This case is an ideal vehicle to clarify the relatedness standard and restore predictability regarding where businesses are subject to specific jurisdiction. The majority below explicitly noted that there are "no material factual conflicts nor any dispute over any factual findings in the superior court." Pet. App. 8a-9a. Moreover, the purely legal question of whether specific-jurisdiction's relatedness prong requires a causal connection between the plaintiff's claims and the defendant's forum activities is outcome-determinative. The majority below did not disagree that respondents' "claims would be exactly the same if [Bristol-Myers] had no contact whatsoever with California," *id.* at 29a, and respondents have never argued that they could satisfy the causal relatedness tests employed in the First, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits or in the Massachusetts, Washington, Oregon, and Arizona high courts. And the legal issues have been ventilated in the extensive majority and dissenting opinions below that were informed by extensive *amicus* participation in support of both sides. *See id.* at 87a-88a.

In sum, there is no prudential reason to allow the relatedness split to linger for longer than it already has. The Court should grant the writ to reaffirm *Daimler* and make explicit the causal-relationship relatedness requirement from its past cases.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2016

# APPENDIX

# APPENDIX A

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IN THE SUPREME COURT
OF CALIFORNIA

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No. S221038

Ct.App. 1/2 A140035

San Francisco County
Super. Ct. JCCP No. 4748

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BRISTOL-MYERS SQUIBB COMPANY

*Petitioner,*

v.

THE SUPERIOR COURT OF
SAN FRANCISCO COUNTY,

*Respondent;*

BRACY ANDERSON et al.,

*Real Parties in Interest.*

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Bristol-Myers Squibb Company (BMS), a pharmaceutical manufacturer, conducts significant business and research activities in California but is neither incorporated nor headquartered here. In March 2012, eight separate amended complaints were filed in San Francisco Superior Court by or on behalf of 678 individuals, consisting of 86 California residents and 592 nonresidents, all of whom allegedly were prescribed and ingested Plavix, a drug created and marketed by BMS, and as a result

suffered adverse consequences. BMS contests the propriety of a California court's exercising personal jurisdiction over it for purposes of adjudicating the nonresident plaintiffs' claims.

Under the particular circumstances present here, we conclude personal jurisdiction is authorized by Code of Civil Procedure section 410.10, which extends jurisdiction to the maximum extent permissible under the United States Constitution. Although BMS's business contacts in California are insufficient to invoke general jurisdiction, which permits the exercise of jurisdiction over a defendant regardless of the subject of the litigation, we conclude the company's California activities are sufficiently related to the nonresident plaintiffs' suits to support the invocation of specific jurisdiction, under which personal jurisdiction is limited to specific litigation related to the defendant's state contacts. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 446 (*Vons*).)

Accordingly, we affirm the judgment of the Court of Appeal, which held that BMS was subject to the personal jurisdiction of the California courts on the basis of specific jurisdiction.

## I. Factual and Procedural Background

BMS manufactures Plavix, a prescription drug used to inhibit blood clotting. In the eight amended complaints filed in the superior court, 86 California residents and 592 residents of 33 other states sued BMS and McKesson Corporation, a pharmaceutical distributor headquartered in California, for injuries

allegedly arising out of their use of Plavix.[1] The state in which the largest number of plaintiffs reside is Texas, with 92 plaintiffs, followed by the 86 California plaintiffs, followed by Ohio, with 71 plaintiffs.

Each amended complaint contains the same 13 causes of action: strict products liability (based on both design defect and manufacturing defect); negligence; breach of implied warranty; breach of express warranty; deceit by concealment (Civ. Code, §§ 1709, 1710); negligent misrepresentation; fraud by concealment; unfair competition (Bus. & Prof. Code, § 17200); false or misleading advertising (Bus. & Prof. Code, § 17500); injunctive relief for false or misleading advertising (Civ. Code, § 1750 et. seq.); wrongful death; and loss of consortium.

The plaintiffs allege that defendants engaged in "negligent and wrongful conduct in connection with the design, development, manufacture, testing, packaging, promoting, marketing, distribution, labeling, and/or sale of Plavix." According to the complaints, defendants allegedly promoted the drug to consumers and physicians by falsely representing it "as providing greater cardiovascular benefits, while being safer and easier on a person's stomach than aspirin," but defendants knew those claims were untrue because ingesting Plavix allegedly involves "the risk of suffering a heart attack, stroke,

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[1] A ninth case, filed in Santa Clara Superior Court by the County of Santa Clara against defendants was also joined with the other eight cases and assigned to a coordination trial judge of the San Francisco Superior Court. The complaint filed in that matter is not in the record before us nor is it a subject of dispute among the parties as to matters of personal jurisdiction.

internal bleeding, blood disorder or death [which] far outweighs any potential benefit."

Plaintiffs allege different injuries, and sometimes combinations of injuries, which they claim were caused from the ingestion of Plavix. These injuries include bleeding, bleeding ulcers, gastrointestinal bleeding, cerebral bleeding, rectal bleeding, heart attack, stroke, hemorrhagic stroke, subdural hematoma, thrombotic thrombocytopenic purpura, and death. The complaints allege that 18 of the 678 individuals whose injuries underlay these actions died as the result of ingesting Plavix.

The actions were assigned as a coordinated matter to a judge of the San Francisco Superior Court.

BMS moved to quash service of summons on the ground that the court lacked personal jurisdiction over it to adjudicate the claims of the 592 nonresident plaintiffs, who are real parties in interest in this proceeding (hereafter referred to as "the nonresident plaintiffs"). BMS noted that the complaints' allegations do not include any factual claims that the nonresident plaintiffs' injuries occurred in California or that they had been treated for their injuries in California.

In declarations supporting the motion, BMS officers stated that the company is incorporated in Delaware, is headquartered in New York City, and maintains substantial operations in New Jersey, including major research and development campuses. BMS has approximately 6,475 employees in the New York and New Jersey area, comprising 51 percent of its United States workforce.

BMS further asserted that its research and development of Plavix did not take place in California, nor was any work related to its labeling, packaging, regulatory approval, or its advertising or marketing strategy performed by any of its employees in this state. BMS has never manufactured Plavix in California. These activities were instead performed or directed from the company's New York headquarters and New Jersey operating facilities. According to data provided by the company, in a 12-month period ending in July 2012, BMS's sales revenue from Plavix sales in California constituted 1.1 percent of the company's total nationwide sales revenue of all of its products.

But the declarations submitted by BMS also disclosed that the company maintains substantial operations in California, including five offices that are primarily research and laboratory facilities employing approximately 164 people. BMS additionally employs approximately 250 sales representatives in the state. BMS also has a small office in Sacramento to represent and advocate for the company in state government affairs.

In opposition to the motion to quash, plaintiffs submitted materials showing that BMS sold almost 187 million Plavix pills to distributors and wholesalers in California in 2006-2012, with sales revenue of almost $918 million. Furthermore, plaintiffs noted that BMS maintains a registered agent for service of process in California.

The superior court denied BMS's motion to quash service of summons, concluding the company's sales and other activities in California were sufficiently

extensive to subject it to the general jurisdiction of the state courts.

BMS petitioned the Court of Appeal for a writ of mandate, naming the nonresident plaintiffs as real parties in interest. The Court of Appeal first summarily denied the petition on the same day as the United States Supreme Court announced its decision in *Daimler AG v. Bauman* (2014) 571 U.S. ___ [134 S.Ct. 746] (*Daimler*), which clarified limits on general jurisdiction. We granted review and transferred the matter back to the Court of Appeal for issuance of an order to show cause in light of *Daimler*. After briefing and oral argument, the Court of Appeal again denied the writ, this time by an opinion holding that BMS's activities in California were insufficient to subject it to general jurisdiction in the state, but that, given the nature of the action and BMS's activities in California, our courts may properly exercise specific jurisdiction over BMS in this matter.

We granted BMS's petition for review, requesting briefing on both types of personal jurisdiction, general and specific.

## II. Discussion

Under Code of Civil Procedure section 410.10, California courts "may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." "The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts." (*Walden v. Fiore* (2014) 571 U.S. ___, ___ [134 S.Ct. 1115, 1121].) "Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident

defendant — not the convenience of plaintiffs or third parties." (*Id.* at p. ___ [134 S.Ct. at p. 1122].)

Under the federal Constitution, a court exercising jurisdiction over a nonresident defendant comports with due process as long as the defendant "has such minimum contacts with the state that the assertion of jurisdiction does not violate ' "traditional notions of fair play and substantial justice." ' " (*Vons, supra*, 14 Cal.4th at p. 444, quoting *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316 (*International Shoe*).) Plaintiffs bear the initial burden of proving state contacts sufficient to justify the exercise of jurisdiction. (*Vons*, *supra*, 14 Cal.4th at p. 449.) The jurisdiction of courts to render judgment against a person is historically grounded in the courts' power over the person, originally premised on a person's presence within the territorial jurisdiction of the court. (*International Shoe*, *supra*, 326 U.S. at p. 316.) Because "the corporate personality is a fiction," however, a corporation's " 'presence' " in a state must be determined by the activities of its agents (*ibid.*), and the demands of due process in this context "may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." (*Id.* at p. 317.)

In some cases, the corporation's continuous activities within the state have been found "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." (*International Shoe, supra*, 326 U.S. at p. 318.) This has become known as "general," or "all-purpose,"

jurisdiction. (*Daimler*, *supra*, 571 U.S. ___ [134 S.Ct. 746, 751, 754].)

In other circumstances, where the company's activities in the forum state are more limited, general jurisdiction may be lacking but jurisdiction may nonetheless be proper because the litigation is derived from obligations that "arise out of or are connected with the [company's] activities within the state." (*International Shoe*, *supra*, 326 U.S. at pp. 319, 320.) This has become known as "specific," or "case-linked," jurisdiction. (*Daimler*, *supra*, 571 U.S. at p. ___ [134 S.Ct. at pp. 751, 754]; *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 564 U.S. ___, ___ [131 S.Ct. 2846, 2851] (*Goodyear*).)

"When a defendant moves to quash service of process on jurisdictional grounds, the plaintiff has the initial burden of demonstrating facts justifying the exercise of jurisdiction. [Citation.] Once facts showing minimum contacts with the forum state are established, however, it becomes the defendant's burden to demonstrate that the exercise of jurisdiction would be unreasonable. [Citation.] When there is conflicting evidence, the trial court's factual determinations are not disturbed on appeal if supported by substantial evidence. [Citation.] When no conflict in the evidence exists, however, the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record." (*Vons*, *supra*, 14 Cal.4th at p. 449.)

Although the briefing and record at the trial court did not have the benefit of being informed by the high court's decision in *Daimler*, there appears to be no material factual conflicts nor any dispute over any

factual findings in the superior court. We, therefore, consider the possible exercise of each type of jurisdiction as a matter of law and on the undisputed facts.

## A. General Jurisdiction

### 1. *Case law concerning general jurisdiction*

The landmark 1945 decision of the United States Supreme Court in *International Shoe*, *supra*, 326 U.S. 310, serves as the starting point of modern jurisprudence concerning general jurisdiction. Although the high court resolved that case under a specific jurisdiction theory, it also described general jurisdiction as embracing "instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." (*International Shoe*, *supra*, 326 U.S. at p. 318.) Subsequent to *International Shoe*, the high court has addressed the concept of general jurisdiction in only a handful of cases.

In *Perkins v. Benguet Mining Co.* (1952) 342 U.S. 437 (*Perkins*), the high court concluded that a company that had temporarily ceased mining operations abroad and had relocated its limited corporate activities to Ohio could be sued in Ohio on a cause of action unrelated to its Ohio corporate activities. (*Id.* at pp. 447-448.) In *Perkins*, because of the wartime Japanese occupation of the Philippine Islands, a Philippine corporation had ceased mining operations on all its properties there, but it maintained limited corporate activities through its president and principal shareholder who had relocated to Ohio. A shareholder then sued the

company in Ohio for unpaid dividends and for its failure to issue her certificates for her shares of stock. The high court applied the standard set forth in *International Shoe* and concluded that the president's business activities through his home in Ohio reflected "a continuous and systematic supervision of the necessarily limited wartime activities of the company." (*Perkins*, *supra*, 342 U.S. at p. 448.)

The high court in *Perkins* explained that after the company's mining operations ceased due to the occupation, the president of the company returned to his residence in Ohio. He kept a home office there, maintaining the company's files. From that office he "carried on correspondence relating to the business of the company and to its employees," drew and distributed salary checks on behalf of the company, used and maintained two active Ohio bank accounts carrying substantial balances of the company's funds, retained another Ohio bank to act as transfer agent for the stock of the company, held several directors' meetings in his home or home office, "supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines" from his Ohio home office, and dispatched funds from Ohio to cover purchases of machinery for such rehabilitation. (*Perkins*, *supra*, 342 U.S. at p. 448.)

The high court observed that although "no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons." (*Perkins*, *supra*, 342 U.S. at p. 448.) Thus, the company's

wartime operations had been effectively shifted almost entirely to the president's home office in Ohio, which meant that "under the circumstances above recited, it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding." (*Ibid.*) In other words, the requirements for the exercise of general jurisdiction were met.

In *Helicopteros Nacionales de Colombia v. Hall* (1984) 466 U.S. 408 (*Helicopteros*), the high court concluded that general jurisdiction was not supported in the forum state when the defendant corporation was based abroad, had no physical presence in the forum state other than limited business purchases and contract negotiations, and the cause of action arose abroad and was unrelated to the company's contacts with the forum state. In *Helicopteros*, the survivors of four United States citizens, who had died in a helicopter crash in Peru, filed wrongful death actions in Texas against the owner and operator of the helicopter, a Colombian corporation. (*Id.* at pp. 409-410.) Prior to the helicopter crash, the Colombian corporation had conducted contract negotiations in Texas with the decedents' Texas employer to provide helicopter services, bought helicopters in Texas, and sent employees there for training, but did not conduct other operations or maintain a place of business in the state. None of the plaintiffs or their decedents resided in Texas. (*Id.* at pp. 410-412.) The high court concluded that neither the negotiation of a single contract and receipt of contractual payment through a Texas bank, nor the purchase of helicopters and associated employee training

sessions in Texas, constituted "the kind of continuous and systematic general business contacts" that had justified general jurisdiction in *Perkins*. (*Helicopteros* at p. 416; see *id.* at pp. 416-418.)

More recently, in *Goodyear*, *supra*, 564 U.S. ___ [131 S.Ct. 2846], and *Daimler*, *supra*, 571 U.S. ___ [134 S.Ct. 746], the high court significantly elaborated upon its analysis of general jurisdiction, clarifying that in order to support the exercise of general jurisdiction over a corporation its contacts with the forum state must be so extensive as to render the company essentially "'at home'" in the state. (*Daimler*, *supra*, 571 U.S. at p. ___ [134 S.Ct. at p. 751; see *Goodyear*, *supra*, 564 U.S. at p. ___ [131 S.Ct. at p. 2851].) The United States Supreme Court's description of general jurisdiction for purposes of the federal due process clause, as set forth in *Goodyear* and *Daimler*, is binding upon us and, as explained below, dictates the conclusion that BMS is not subject to the general jurisdiction of California courts.

In *Goodyear*, the high court concluded that the plaintiffs failed to establish support for the exercise of general jurisdiction where the defendant companies were based abroad, sold only a limited quantity of their products in the forum state, and the cause of action — involving the defendants' products sold abroad — also arose abroad. In that case, two young men from North Carolina were killed in a bus accident outside Paris, France. (*Goodyear*, *supra*, 564 U.S. at p. ___ [131 S.Ct. at p. 2851].) Their parents attributed the accident to an allegedly defective tire manufactured by Goodyear's subsidiary in Turkey and filed suit in a North Carolina state

court, naming Goodyear and its subsidiaries in Turkey, France, and Luxembourg as defendants. (*Id.* at pp. ___-___ [131 S.Ct. at pp. 2851-2852].) Although a small percentage of their tires was distributed in North Carolina by other Goodyear affiliates, the foreign subsidiaries challenged the North Carolina court's exercise of general jurisdiction over them, contending that they did no direct business and employed no workers in North Carolina. (*Id.* at pp. ___, ___ [131 S.Ct. at pp. 2850, 2852].)

The high court first noted that North Carolina courts lacked specific jurisdiction to adjudicate the controversy because the accident had occurred abroad and the allegedly defective tire had been manufactured and sold abroad. (*Goodyear*, *supra*, 564 U.S. at p. ___ [131 S.Ct. at p. 2851].) The court then held that the defendant corporations' contacts with North Carolina were also insufficient for general jurisdiction: "Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State . . . fall far short of . . . 'the continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." (*Goodyear*, *supra*, at p. ___ [131 S.Ct. at p. 2857], quoting *Helicopteros*, *supra*, 466 U.S. at p. 416.) The *Goodyear* court explained its "at home" rule for corporations as analogous to a natural person's domicile in the forum state: "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's

domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." (*Goodyear*, *supra*, at p. ___ [131 S.Ct. at pp. 2853-2854].)

Three years after *Goodyear*, in *Daimler*, supra, 571 U.S. ___ [134 S.Ct. 746], the court further elaborated on its articulation of the "at home" requirement. In *Daimler*, Argentinian residents brought an action in California against DaimlerChrysler AG (DaimlerChrysler), a German public stock company, alleging that its wholly owned subsidiary, Mercedes-Benz Argentina, had "collaborated with state security forces to kidnap, detain, torture, and kill" the plaintiffs or their relatives in Argentina during that nation's " 'Dirty War.' " (*Daimler*, *supra*, at p. ___ [134 S.Ct. at pp. 750-751].) The plaintiffs' claim of general jurisdiction over DaimlerChrysler in California was based in significant part on the California activities of another DaimlerChrysler subsidiary, Mercedes-Benz USA, LLC (MBUSA). Although incorporated in Delaware and headquartered in New Jersey, MBUSA had substantial facilities in California, using them to import and distribute Mercedes-Benz automobiles in the state. (*Id.* at p. ___ [134 S.Ct. at pp. 751-752].)

Even attributing to DaimlerChrysler the activities of its subsidiary, MBUSA, the high court nevertheless found DaimlerChrysler's contacts with California insufficient to justify the exercise of general jurisdiction over it. (*Daimler*, *supra*, 571 U.S. at p. ___ [134 S.Ct. at p. 760].) The court reiterated its observation in *Goodyear* that a corporation's state of incorporation and its principal place of business

are the two "paradigm all-purpose forums." (*Daimler*, *supra*, at p. ___ [134 S.Ct. at p. 760.) Although it did not limit general jurisdiction to those two circumstances, the *Daimler* court explained that general jurisdiction may not be based merely on activities in the forum state that can be characterized as continuous and systematic; rather, the corporation's activities must be "'so "continuous and systematic" as to render [it] essentially at home in the forum State.'" (*Id.* at p. ___ [134 S.Ct. at p. 761], quoting *Goodyear*, *supra*, 564 U.S. at p. ___ [131 S.Ct. at p. 2851].)

The *Daimler* court acknowledged that in an exceptional case such as *Perkins* "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." (*Daimler*, *supra*, 571 U.S. at p. ___, fn. 19 [134 S.Ct. at p. 761, fn. 19].) The court, however, emphasized the truly "'exceptional facts'" of *Perkins*, where "[g]iven the wartime circumstances, Ohio could be considered 'a surrogate for the place of incorporation or head office.'" (*Daimler*, *supra*, at p. ___, fn. 8 [134 S.Ct. at p. 756, fn. 8].) DaimlerChrysler's activities in California, the court observed, "plainly do not approach that level." (*Id.* at p. ___, fn. 19 [134 S.Ct. at p. 761, fn. 19.)

Furthermore, in responding to a concurring opinion by Justice Sotomayor, the *Daimler* majority made clear that the general jurisdiction inquiry "does not 'focu[s] solely on the magnitude of the defendant's in-state contacts.'" (*Daimler*, *supra*, 571 U.S. at p. ___, fn. 20 [134 S.Ct. at p. 762, fn. 20].) Instead, general

jurisdiction "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." (*Ibid.*) Otherwise, a corporation with significant operations in many states would be deemed at home in all of them. (*Ibid.*) The majority reasoned that to allow the adjudication in California of a dispute arising solely in Argentina merely based on MBUSA's sales activities in the state would give the same global adjudicatory reach to every state in which DaimlerChrysler or its subsidiary had sizeable sales. The court rejected such an "exorbitant exercise[] of all-purpose jurisdiction" because it would defeat the ability of out-of-state defendants to structure their conduct so as to have some predictability regarding the possibility of being subjected to litigation in a given forum state. (*Id.* at p. ___ [134 S.Ct. at pp. 761-762].)

The high court also made clear that because the plaintiffs in *Daimler* had never attempted to argue that California could assert specific jurisdiction over DaimlerChrysler, the court had no reason to undertake such an analysis. (*Daimler*, *supra*, 571 U.S. at p. ___ [134 S.Ct. at p. 758].)

2. *Plaintiffs have failed to show that BMS is subject to general jurisdiction in California*

The United States Supreme Court's at home rule for general jurisdiction over a corporation, as articulated in *Goodyear* and *Daimler*, and, to some extent *Perkins*, defeats the nonresident plaintiffs' claim that California may assert general jurisdiction over BMS. BMS may be regarded as being at home in Delaware, where it is incorporated, or perhaps in New York and New Jersey, where it maintains its principal business centers. Although the company's

ongoing activities in California are substantial, they fall far short of establishing that is it at home in this state for purposes of general jurisdiction.

Similar to the California subsidiary in *Daimler*, BMS has sold large volumes of its products in California. Nevertheless, the high court plainly rejected the theory that a corporation is at home wherever its sales are "sizeable." (*Daimler*, *supra*, 571 U.S. at p.___ [134 S.Ct. at p. 761].) BMS employed approximately 164 people in California in addition to its 250 sales representatives in this state. But the company's total California operations are much less extensive than its activities elsewhere in the United States. As noted earlier, in New York and New Jersey alone, BMS employed approximately 6,475 people, 51 percent of its United States workforce. In assessing BMS's California business activities in comparison to the company's business operations "in their entirety, nationwide," we find nothing to warrant a conclusion that BMS is at home in California. (*Daimler*, *supra*, at p. ___, fn. 20 [134 S.Ct. at p. 762, fn. 20].) As the high court warned in *Daimler*, to conclude that BMS may be sued in California on any cause of action, whether or not related to its activities here, under a theory of general jurisdiction, would be to extend globally the adjudicatory reach of every state in which the company has significant business operations.

The nonresident plaintiffs stress that in neither *Goodyear* nor *Daimler* did the high court strictly limit general jurisdiction to a company's state of incorporation or its principal place of business. Nevertheless, both decisions make clear that the suitability of general jurisdiction is rooted in the

concept of an individual's domicile and its equivalent place for a corporation. (*Daimler*, *supra*, 571 U.S. at p. ___ [134 S.Ct. at p. 760]; *Goodyear*, *supra*, 564 U.S. 437 [131 S.Ct. at pp. 2853-2854].) Therefore, setting aside the state of a company's incorporation or its headquarters, a plaintiff has the burden of showing that a company's conduct in a given forum state may be so substantial and of such a kind as to render it at home there.

*Goodyear* and *Daimler* approved the finding of general jurisdiction in *Perkins*, *supra*, 342 U.S. 437. That case involved the exceptional fact pattern of a mining company's wartime relocation of its overseas operations to Ohio, which functioned as the equivalent of the corporation's headquarters through a home office in the company president's own residence. Quite literally, the mining company in *Perkins* was also at home in this unique context. But nothing in the record of the present matter suggests that California has served as the equivalent of BMS's headquarters, even temporarily.

The nonresident plaintiffs also rely on the fact that BMS has long been registered to do business in California and has maintained an agent for service of process here. California law, however, requires a foreign corporation transacting business here to name an agent in the state for service of process. (Corp. Code, § 2105, subd. (a)(5).) As the high court has explained, "[t]he purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies *growing out of transactions within the State*." (*Morris & Co. v. Ins. Co.* (1929)

279 U.S. 405, 408-409, italics added.) Accordingly, a corporation's appointment of an agent for service of process, when required by state law, cannot compel its surrender to general jurisdiction for disputes unrelated to its California transactions. The "designation of an agent for service of process and qualification to do business in California alone are insufficient to permit general jurisdiction." (*Thomson v. Anderson* (2003) 113 Cal.App.4th 258, 268, citing *DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1095; *Gray Line Tours v. Reynolds Electrical & Engineering Co.* (1987) 193 Cal.App.3d 190, 194.)

Finally, the nonresident plaintiffs argue BMS is subject to general jurisdiction in California because it has contracted for distribution of Plavix with McKesson Corporation, which is headquartered in San Francisco, allowing BMS "to make a substantial profit within California through McKesson's California contacts." As explained above, however, BMS's sizeable sales of its products in California are insufficient, under *Goodyear*, *supra*, 564 U.S. ___ [131 S.Ct. 2846] and *Daimler*, *supra*, 571 U.S. ___ [134 S.Ct. 746], to make it at home in this state and subject it to the general jurisdiction of our courts. That some of these sales were made to or through a distributor headquartered here does not change the analysis.

As a result, we conclude that BMS is not subject to the general jurisdiction of the California courts.

## B. Specific Jurisdiction

1. *Case law concerning specific jurisdiction*

Although the high court's recent cases have narrowed the scope of general jurisdiction, in *Daimler* the majority specifically commented on the continued viability and breadth of the court's preexisting specific jurisdiction jurisprudence. In responding to the concern expressed by Justice Sotomayor in her separate opinion in *Daimler* that the court was committing an injustice by limiting the availability of general jurisdiction, the majority remarked that "Justice Sotomayor treats specific jurisdiction as though it were barely there" and that "[g]iven the many decades in which specific jurisdiction has flourished, it would be hard to conjure up an example of the 'deep injustice' Justice Sotomayor predicts as a consequence of our holding that California is not an all-purpose forum for suits against [DaimlerChrysler]." (*Daimler*, *supra*, 571 U.S. at p. ___, fn. 10 [134 S.Ct. at p. 758, fn. 10].)

The basic precepts governing specific jurisdiction set forth in pre-*Daimler* decisions are well settled. In ascertaining the existence of specific jurisdiction, courts must analyze the " 'relationship among the defendant, the forum, and the litigation.' " (*Helicopteros*, *supra*, 466 U.S. at p. 414, quoting *Shaffer v. Heitner* (1977) 433 U.S. 186, 204.) The question of whether a court may exercise specific jurisdiction over a nonresident defendant involves examining (1) whether the defendant has " 'purposefully directed' " its activities at the forum state (*Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 774 (Keeton)); (2) whether the plaintiff's claims arise out of or are related to these

forum-directed activities (*Helicopteros*, *supra*, 466 U.S. at p. 414); and (3) whether the exercise of jurisdiction is reasonable and does not offend "'"traditional notions of fair play and substantial justice."'"[2] (*Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 113 (*Asahi*), quoting *International Shoe*, *supra*, 326 U.S. at p. 316.)

In our own jurisprudence, we have said that a plaintiff has the initial burden of demonstrating facts to support the first two factors, which establish the requisite minimum contacts with the forum state. The burden then shifts to the defendant to show that the exercise of jurisdiction would be unreasonable under the third factor. (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062 (*Snowney*); see also *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 477 (*Burger King*) ["where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable"].)

Our courts have also explained that the relatedness requirement for specific jurisdiction is determined under the " 'substantial connection' test," which "is satisfied if 'there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim.' [Citation.]" (*Snowney*, *supra*,

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[2] BMS states it is not contesting the first or third factors and that the company is contesting only whether the claims of the nonresident plaintiffs are related to its activities in California. But, as we will explain, BMS's arguments are not as narrow as it contends. Accordingly, we will examine here all three factors relevant to the specific jurisdiction analysis.

35 Cal.4th at p. 1068.) This test requires courts to evaluate the nature of the defendant's activities in the forum and the relationship of the claim to those activities in order to answer the ultimate question under the due process clause: whether the exercise of jurisdiction in the forum is fair. Under the substantial connection test, " 'the intensity of forum contacts and the connection of the claim to those contacts are inversely related.' " (*Ibid.*) " '[T]he more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim.' [Citation.] Thus, '[a] claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction.' . . . Indeed, ' " '[o]nly when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that [contact].' " ' [Citation.]" (*Ibid.*) Finally, the defendant's activities in the forum state need not be either the proximate cause or the "but for" cause of the plaintiff's injuries. (*Ibid.*)

2. *Purposeful availment*

As the high court has explained, "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations,' " and that "[b]y requiring that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,' " the due process clause affords predictability and allows potential defendants to tailor their conduct " 'with some minimum assurance

as to where that conduct will and will not render them liable to suit.' " (*Burger King*, *supra*, 471 U.S. at pp. 471-472.)

"Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, [citation], and the litigation results from alleged injuries that 'arise out of or relate to' those activities." (*Burger King*, *supra*, 471 U.S. at p. 472, fn. omitted.) These activities cannot be the result of the unilateral actions of another party or a third person, because the " 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." (*Id.* at p. 475.) "When a [nonresident defendant] 'purposefully avails itself of the privilege of conducting activities within the forum State,' [citation], it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." (*World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297 (*World-Wide Volkswagen*).)

In *Snowney*, a California resident filed a class action in this state against a group of Nevada hotels, alleging several causes of action related to their purported failure to provide notice of an energy surcharge imposed on hotel guests. (*Snowney, supra*, 35 Cal.4th at pp. 1059-1060.) The hotels conducted no business and had no bank accounts or employees in California, but they advertised heavily in this

state using California-based media, including billboards, newspapers, and ads aired on radio and television stations, as well as a Web site for room quotes and reservations. They also received a significant portion of their business from California residents who stayed at their hotels. (*Id.* at p. 1059.)

This court held that the Nevada hotels had purposefully availed themselves of the privilege of doing business in California because their Web site had touted "the proximity of their hotels to California" and provided "driving directions from California to their hotels," thereby "specifically target[ing] residents of California." (*Snowney*, *supra*, 35 Cal.4th at p. 1064.) Furthermore, "[a]side from their Web site specifically targeting California residents, defendants advertised extensively in California through billboards, newspapers, and radio and television stations located in California" and "regularly sent mailings advertising their hotels to selected California residents." (*Id.* at p. 1065.) "In doing so, defendants necessarily availed themselves of the benefits of doing business in California and could reasonably expect to be subject to the jurisdiction of courts in California." (*Ibid.*)

In the present matter, there is no question that BMS has purposely availed itself of the privilege of conducting activities in California, invoking the benefits and protection of its laws, and BMS does not contend otherwise. Not only did BMS market and advertise Plavix in this state, it employs sales representatives in California, contracted with a California-based pharmaceutical distributor, operates research and laboratory facilities in this state, and even has an office in the state capital to

lobby the state on the company's behalf. As in *Snowney*, *supra*, 35 Cal.4th 1054, BMS actively and purposefully sought to promote sales of Plavix to California residents, resulting in California sales of nearly $1 billion over six years. Moreover, unlike the Nevada hotels in *Snowney*, BMS maintains a physical presence in California, employing well over 400 people here.

Accordingly, we conclude that BMS has purposefully availed itself of the benefits of California such that the first element of the test for specific personal jurisdiction is met concerning matters arising from or related to BMS's contacts with the state. On the basis of these extensive contacts relating to the design, marketing, and distribution of Plavix, BMS would be on clear notice that it is subject to suit in California concerning such matters. (*World-Wide Volkswagen*, *supra*, 444 U.S. at p. 19.)

3. *Arises from or is related to*

As previously described, "for the purpose of establishing jurisdiction the intensity of forum contacts and the connection of the claim to those contacts are inversely related." (*Vons*, *supra*, 14 Cal.4th at p. 452.) "[T]he more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." (*Id.* at p. 455.) Thus, "[a] claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction." (*Id.* at p. 452.)

In *Vons*, we assessed, on relatedness grounds, whether California courts could exercise specific

jurisdiction over nonresident companies for causes of action involving out-of-state injuries that did not arise directly from their California contacts. (*Vons, supra*, 14 Cal.4th 434.) The plaintiffs in *Vons* were restaurant franchisees who brought an action for loss of business after contaminated hamburger meat caused illnesses in California and Washington, resulting in adverse publicity. In California, the franchisees sued two parties: the franchisor and the hamburger supplier, Vons Companies, Inc. (Vons), which processed hamburger patties in California and supplied them to the franchisor. Vons cross-complained against the franchisor and two Washington franchisees, suing them for negligence and indemnification for failing to properly cook the hamburger meat at restaurants in Washington, causing the injuries and deaths to customers there that gave rise to their joint liability with Vons. In *Vons*, the issue was whether the California court had specific jurisdiction over these two Washington-based franchisees, Seabest Foods, Inc., and Washington Restaurant Management, Inc. (WRMI). (*Id.* at pp. 440-442.)

Seabest's and WRMI's contacts with California included food purchases from California suppliers, sending personnel to franchisor training sessions in California, remitting franchise payments to California, permitting the franchisor's inspection of their restaurants by its California-based inspectors, and the negotiation of their franchise agreements in California, which agreements stated that any disputes would be governed by California law. Because Vons was not a party to the franchise contracts for either Seabest or WRMI, those

franchisees' contacts with California did not directly give rise to the causes of action asserted by Vons. (*Vons*, *supra*, 14 Cal.4th at p. 452.) Nevertheless, this court found personal jurisdiction was properly exercised over them in California because the forum contacts bore a substantial relation to the cause of action. We explained that requiring the two Washington franchisees to answer to Vons's claim "is not to allow a third party unilaterally to draw them into a connection with the state; rather, it was Seabest and WRMI who established the connection." (*Id.* at p. 451.)

This court further elaborated: "A claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate. The due process clause is concerned with protecting nonresident defendants from being brought unfairly into court in the forum, on the basis of random contacts. That constitutional provision, however, does not provide defendants with a shield against jurisdiction when the defendant purposefully has availed himself or herself of benefits in the forum." (*Vons*, *supra*, 14 Cal.4th at p. 452.)

In the present matter, plaintiffs allege that BMS negligently designed and manufactured Plavix, failed to disclose material information in its advertising and promotion of Plavix and fraudulently and falsely advertised and promoted the product, and that BMS is liable to those who relied on such representations and were injured by Plavix. Their complaints also

contend that "Plavix was heavily marketed directly to consumers through television, magazine and internet advertising." BMS does not contest that its marketing, promotion, and distribution of Plavix was nationwide and was associated with California-based sales representatives and a California distributor, McKesson Corporation, which plaintiffs allege is jointly liable.

The California plaintiffs' claims concerning the alleged misleading marketing and promotion of Plavix and injuries arising out of its distribution to and ingestion by California plaintiffs certainly arise from BMS's purposeful contacts with this state, and BMS does not deny that it can be sued for such claims in California. As to the nonresident plaintiffs' claims, the Court of Appeal understood plaintiffs' complaints as alleging that BMS sold Plavix to both the California plaintiffs and the nonresident plaintiffs as part of a common nationwide course of distribution. BMS has not taken issue with that characterization, nor has it asserted that either the product itself or the representations it made about the product differed from state to state. Both the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state. Thus, the nonresident plaintiffs' claims bear a substantial connection to BMS's contacts in California. BMS's nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresident plaintiffs' claims and the company's contacts in California concerning Plavix.

Plaintiffs also allege that BMS negligently developed and designed Plavix, which serves as the basis of its claims of products liability, negligence, and breaches of express and implied warranties. BMS maintains research and laboratory facilities in California, and it presumably enjoys the protection of our laws related to those activities. Although there is no claim that Plavix itself was designed and developed in these facilities, the fact that the company engages in research and product development in these California facilities is related to plaintiffs' claims that BMS engaged in a course of conduct of negligent research and design that led to their injuries, even if those claims do not arise out of BMS's research conduct in this state. Accordingly, BMS's research and development activity in California provides an additional connection between the nonresident plaintiffs' claims and the company's activities in California.

BMS and our dissenting colleagues attempt to characterize the claims of the California plaintiffs as "parallel" to and failing to "intersect" with the nonresident plaintiffs' claims and argue based on this characterization that BMS's conduct in California is insufficiently related to the nonresident plaintiffs' claims. More specifically, BMS contends that the nonresident plaintiffs' claims would be exactly the same if BMS had no contact whatsoever with California. This characterization ignores the uncontested fact that all the plaintiffs' claims arise out of BMS's nationwide marketing and distribution of Plavix. The claims are based not on "similar" conduct, as our dissenting colleagues contend, but instead on a single, coordinated, nationwide course of

conduct directed out of BMS's New York headquarters and New Jersey operations center and implemented by distributors and salespersons across the country. (See *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 151 [reasoning that the interstate nature of a defendant's business, while "not an independent basis of jurisdiction" weighs "in favor of requiring him to defend here"].)

Moreover, the argument that claims based on a nationwide course of conduct fail to establish relatedness for purposes of minimum contacts rests on the invalid assumption that BMS's forum contacts must bear some substantive legal relevance to the nonresident plaintiffs' claims, as the dissent explicitly contends. Yet in *Vons*, this court carefully considered and ultimately rejected such a substantive relevance requirement. (*Vons*, *supra*, 14 Cal.4th at p. 475 ["we conclude that the substantive relevance test is inappropriate"].) Rather, it is sufficient if "because of the defendants' relationship with the forum, it is not unfair to require that they answer in a California court for an alleged injury that is substantially connected to the defendants' forum contacts." (*Id.* at p. 453.) Here, BMS's forum contacts, including its California-based research and development facilities, are substantially connected to the nonresident plaintiffs' claims because those contacts are part of the nationwide marketing and distribution of Plavix, a drug BMS researched and developed, that gave rise to all the plaintiffs' claims.

BMS relies on two cases to contend that California courts may not exercise specific jurisdiction over a nonresident defendant sued by a nonresident

plaintiff for injuries occurring outside the state. But in both cases, the defendant company conducted no business in California and had no employees here. (*Fisher Governor Co. v. Superior Court* (1959) 53 Cal.2d 222, 224 [the defendant had "no employees or property in California and has not appointed an agent to receive service of process here"]; *Boaz v. Boyle & Co.* (1995) 40 Cal.App.4th 700, 715 (*Boaz*) [the defendant had "not been licensed to do business in California, and . . . had neither salespersons, employees or representatives here, nor any offices, bank accounts, records or property in this state"].)

Our dissenting colleagues also rely on *Boaz* and a pharmaceutical case from the First Circuit, *Glater v. Eli Lilly & Co.* (1st Cir. 1984) 744 F.2d 213, which held that specific jurisdiction had not been established because the plaintiff's cause of action did not "arise from" the company's forum activities. (*Id* at p. 216.) Although the facts of *Glater* are also involve the sales and marketing of an allegedly defective drug, the pharmaceutical company's contacts with the forum state, New Hampshire, appear to have been far less substantial than BMS's contacts to California.[3]

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[3] In addition, the dissent relies on *Hanson v. Denckla* (1958) 357 U.S. 235, where the plaintiffs filed suit in Florida against a Delaware-based trustee who had no purposeful contacts with Florida, other than those caused by the unilateral activity of the plaintiffs. The dissent's reliance on this case is inapposite because the high court concluded that the defendant in that matter had not purposefully availed herself "of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (*Id.* at p. 253.) Here, the parties do not contest that BMS has purposefully availed itself of California law.

Moreover, none of these cases had the benefit of our reasoning in Vons, where we made clear that we had adopted a sliding scale approach to specific jurisdiction in which we recognized that "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." (*Vons*, *supra*, 14 Cal.4th at p. 455.) As previously described, BMS's contacts with California are substantial and the company has enjoyed sizeable revenues from the sales of its product here — the very product that is the subject of the claims of all of the plaintiffs. BMS's extensive contacts with California establish minimum contacts based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required.

In sum, taking into account all of BMS's activities in this state and their relation to the causes of action at issue here, we conclude that the second element of specific jurisdiction is met, and hence, absent a showing to the contrary by BMS, it would be consistent with due process for it to be subject to litigation in this state concerning injuries allegedly caused by its product Plavix, including those injuries occurring out of state. Not only did BMS purposefully avail itself of the benefits of California by its extensive marketing and distribution of Plavix in this state and by contracting with a California distributor and employing hundreds of California-based salespersons, resulting in its substantial sales of that product here, but the company also maintains significant research and development facilities in California. All of plaintiffs' claims either arose from these activities or are related to those activities. The

circumstance that numerous nonresident plaintiffs have filed their claims alongside those of resident plaintiffs does not alter or detract from this substantial nexus.

As previously discussed, the due process protections afforded by the doctrine of specific jurisdiction are designed to give a potential nonresident defendant adequate notice that it is subject to suit there, and, accordingly, a prospective defendant can assess the extent of that risk and take measures to mitigate such risk or eliminate it entirely by severing its connection with the state. (*World-Wide Volkswagen*, *supra*, 444 U.S. at p. 297.) Indeed, far from taking measures to mitigate the risk of suit in particular forums, BMS embraced this risk by coordinating a single nationwide marketing and distribution effort and by engaging in research and development in California. In that regard, BMS was on notice that it could be sued in California by nonresident plaintiffs. In fact, our courts have frequently handled nationwide class actions involving numerous nonresident plaintiffs. (See *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 915; *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036; *Rutledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164; *Canon U.S.A., Inc. v. Superior Court* (1998) 68 Cal.App.4th 1.)

To the extent that BMS's arguments imply that a California court lacks personal jurisdiction over BMS to adjudicate the claims of the nonresident plaintiffs simply because the nonresident plaintiffs have no connection to and did not suffer any Plavix-related

injuries in the state, the high court has repeatedly rejected such a focus. The minimum contacts test assesses "the relationship among the defendant, the forum, and the litigation." (*Shaffer v. Heitner*, *supra*, 433 U.S. at p. 204.) As the high court explicitly declared in *Keeton*, a "plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." (*Keeton*, *supra*, 465 U.S. at p. 780; see also *Walden v. Fiore*, *supra*, 571 U.S. ___, ___ [134 S.Ct. 1115, 1126] ["it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State"]; *Helicopteros*, *supra*, 466 U.S. at p. 412, fn. 5 [the plaintiffs' "lack of residential or other contacts with Texas of itself does not defeat otherwise proper jurisdiction"]; *Calder v. Jones* (1984) 465 U.S. 783, 788 [the "plaintiff's lack of 'contacts' will not defeat otherwise proper jurisdiction"]; *Rush v. Savchuk* (1980) 444 U.S. 320, 332 ["the plaintiff's contacts with the forum" cannot be "decisive in determining whether the defendant's due process rights are violated"]; see also *Epic Communications, Inc. v. Richwave Technology, Inc.* (2009) 179 Cal.App.4th 314, 336 ["We fail to see how the non-California residency of plaintiff can make a 'compelling case' " with respect to any of the factors supporting personal jurisdiction].)

Finally, BMS and our dissenting colleagues further allege that permitting the exercise of specific jurisdiction in California for the claims of nonresidents based on the company's nationwide sales and marketing would effectively subvert the holding of *Daimler*, *supra*, 571 U.S. ___ [134 S.Ct.

746], in which the court refused to base jurisdiction merely on nationwide sales. But BMS's argument overstates the effect of our conclusion that specific jurisdiction is properly exercised here. Our decision does not render California an all-purpose forum for filing suit against BMS for *any* matter, regardless of whether the action is related to its forum activities. Rather, as with any matter concerning specific jurisdiction, the minimum contacts test is applied on a case-by-case basis, focusing on the nature and quality of the defendant's activities in the state. (*Burger King*, *supra*, 471 U.S. at pp. 474-475.) We simply hold under this specific set of circumstances that, for purposes of establishing the requisite minimum contacts, plaintiffs' claims concerning the allegedly defective design and marketing of Plavix bear a substantial nexus with or connection to BMS's extensive contacts with California as part of Plavix's nationwide marketing, its sales of Plavix in this state, and its maintenance of research and development facilities here so as to permit specific jurisdiction.

4. *The reasonableness of specific jurisdiction*

As previously described, after a plaintiff meets the burden of showing that a defendant has purposefully established minimum contacts with the forum state, the burden then shifts to the defendant to show that the assertion of specific jurisdiction is unreasonable because it does not comport with " 'traditional notions of fair play and substantial justice.' " (*International Shoe*, *supra*, 326 U.S. at p. 316.) BMS does not argue that the assertion of jurisdiction in this case would be fundamentally unfair, but does advance several arguments it contends defeat the claim that their causes of action arose from or are

related to its contacts with California. Analytically, these arguments are more pertinent to consideration of whether the exercise of specific jurisdiction is reasonable, not whether the contested claims arise from or relate to the company's forum activities. The questions raised by BMS — whether California has an interest in litigating the claims of nonresidents, whether BMS will unfairly bear a disproportionate burden of defending itself against all nationwide claims in a single venue of relatively few resident plaintiffs, and whether California should expend its judicial resources on the claims of nonresident plaintiffs — are all circumstances relevant to the issue of whether BMS has established that the exercise of jurisdiction is unreasonable. They do not bear upon the issue of whether the nonresident plaintiffs' claims arise from or are related to BMS's activities in the forum state. Accordingly, we will examine these arguments using the criteria governing reasonableness.

In determining whether the defendant has established that the exercise of specific jurisdiction is unreasonable, the court "must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." (*Asahi*, *supra*, 480 U.S. at p. 113.) Although it must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies" (*World-Wide Volkswagen*, *supra*, 444 U.S. at p. 292), a requirement that may "reflect[] an element of federalism and the character of state sovereignty vis-

à-vis other States" (*Insurance Corp. v. Compagnie des Bauxites* (1982) 456 U.S. 694, 703, fn. 10), the due process clause "is the only source of the personal jurisdiction requirement." (*Id.* at p. 703, fn. 10.) Accordingly, "[t]he relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States . . . [is] the central concern of the inquiry into personal jurisdiction." (*Shaffer v. Heitner*, *supra*, 433 U.S. at p. 204.)

a. *The burden on defendant in litigating the claims in California*

BMS complains that joining the claims of the nonresident plaintiffs to those of the comparatively smaller group of California plaintiffs would unfairly distribute the company's burden of defending this mass tort action by requiring it to defend itself against all nationwide claims in a forum where only a minor portion of its sales occurred. However, as the Court of Appeal noted, regardless of whether California exercises jurisdiction over nonresident plaintiffs' claims, BMS is already burdened by having to defend against the claims of 86 California plaintiffs. Certainly, the addition of 592 nonresident plaintiffs is a significant added burden, but the alternative is to litigate the claims of these other 592 nonresident plaintiffs in a scattershot manner in various other forums, in potentially up to 34 different states.[4] Such an alternative would seem to

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[4] Our dissenting colleagues note that nonresident plaintiffs presumably could file their claims in Delaware or perhaps New Jersey or New York, or in federal court, where they could be coordinated as part of multidistrict litigation, but nothing

be a far more burdensome distribution of BMS's resources in defending these cases than defending them in a single, focused forum.

Pretrial preparation and discovery concerning plaintiffs' claims may pose challenges given the diversity of their states of residence, but, as the Court of Appeal recognized, our state's Civil Discovery Act provides for taking depositions outside California for use at trial. (Code Civ. Proc., § 2026.010.) Moreover, information and documents relevant to plaintiffs' requests for discovery will likely be located in New York or New Jersey, as will the individuals whom plaintiffs are likely to seek to depose, regardless of the venue in which the plaintiffs' claims are filed.

Finally, BMS has provided no evidence to suggest that the cost of litigating plaintiffs' claims in San Francisco is excessive or unduly burdensome for BMS compared to any other relevant forum or forums.[5] BMS, therefore, fails to show that its defense of plaintiffs' claims in California places on it an undue burden.

b. *California's interest in providing a forum for plaintiffs in this case*

BMS further claims that California has no legitimate interest in adjudicating the claims of nonresidents because they have no connection to the

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requires them to choose one of these forums rather than their home states.

[5] Of course, BMS is free to make such a showing on a motion asserting forum non conveniens. (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.) We merely hold that, for purposes of defeating specific jurisdiction, BMS fails to meet its burden.

state. Admittedly, the fact that the nonresident plaintiffs greatly outnumber the California plaintiffs does give us some pause. But in ascertaining the reasonableness of exercising specific jurisdiction, no one factor, by itself, is determinative. More important, there are identifiable interests our state holds in providing a forum for both the resident and nonresident plaintiffs.

First, evidence of other injuries is "admissible to prove a defective condition, knowledge, or the cause of an accident," provided that the circumstances of the other injuries are similar and not too remote. (*Ault v. International Harvester* (1974) 13 Cal.3d 113, 121-122; see also *Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 555 [evidence of prior accidents involving similar airplane with identical single-engine stall-spin characteristics was admissible].) To the extent that evidence of the injuries allegedly suffered by the nonresident plaintiffs may be relevant and admissible to prove that Plavix similarly injured the California plaintiffs, trying their cases together with those of nonresident plaintiffs could promote efficient adjudication of California residents' claims. California, therefore, has a clear interest in providing a forum for this matter.

This interest is further underscored by the substantial body of California law aimed at protecting consumers from the potential dangers posed by prescription medication, including warnings about serious side effects and prohibiting false and misleading labeling. (See, e.g., Bus. & Prof. Code, §§ 4070-4078.) As this court has previously recognized, "California has a strong interest in

protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards." (*Asahi*, *supra*, 39 Cal.3d at p. 53.) It also bears reemphasis that there are no fewer than 250 BMS sales representatives in California. Although at this early stage of the proceedings, the record contains very little evidence concerning the promotional and distribution activities of these sales representatives, California has a clear interest in regulating their conduct.[6] (Cf. Bus. & Prof. Code, § 17500 [permitting claims by nonresidents who are deceived by representations "disseminated from" the State of California].)

In addition, California also has an interest in regulating the conduct of BMS's codefendant, McKesson Corporation, which is headquartered in California, as a joint defendant with BMS. As noted above, in *Vons*, we held that specific jurisdiction was proper over cross-defendants who entered into contracts in California that gave rise to the joint liability and the corresponding right to

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[6] Our dissenting colleagues contend that the record does not establish that BMS's sales representatives misled nonresident physicians concerning the safety and efficacy of Plavix or that McKesson was responsible for providing Plavix to any of the nonresident plaintiffs. (Dis. opn. of Werdegar, J., *post*, at pp. 11-12.) Certainly, the existence of such evidence would lend additional support to the question of whether the claims of the nonresident plaintiffs are not just related to but actually also arise out of BMS's contacts with California. But our discussion here is merely focused on the reasonableness of asserting specific jurisdiction in this matter because our state has an interest in regulating conduct in the pharmaceutical industry that could pose a danger to public welfare, regardless of residency.

indemnification on which the cross-claims against them were based. (See *Vons*, *supra*, 14 Cal.4th at pp. 456-457.) California's interest in adjudicating claims on which McKesson Corporation, a California resident, may be jointly liable with BMS, a nonresident defendant, is readily apparent. Were BMS dismissed from nonresident plaintiffs' cases, California courts would be required to hear their claims against McKesson Corporation while the same plaintiffs litigated the same claims arising from the same facts and the same evidence against BMS in a forum potentially on the opposite side of the country.

c. *Plaintiffs' interest in a convenient and effective forum*

Nonresident plaintiffs have obviously purposefully availed themselves of the jurisdiction of courts in this state by choosing to file all of their claims here — strong evidence that the forum is convenient to them. Eighty-six of the 678 plaintiffs reside in California; only Texas, with 92 plaintiffs, is home to more.

Moreover, the current forum, San Francisco Superior Court, is equipped with a complex litigation department that is well suited to expeditiously handle such large cases. BMS has not shown that this forum is inconvenient for plaintiffs.

d. *Judicial economy and the shared interests of the interstate judicial system*

BMS argues that it would be a waste of California's judicial resources to provide a forum for the nonresident plaintiffs. To be sure, a single court hearing the claims of hundreds of plaintiffs is a

significant burden on that court. But the overall savings of time and effort to the judicial system, both in California and interstate, far outweigh the burdens placed on the individual forum court. The alternative that BMS proposes would result in the duplication of suits in in numerous state or federal jurisdictions at substantial costs to both the judicial system and to the parties, who would have to deal with disparate rulings on otherwise similar procedural and substantive issues.

For claims of mass injuries stemming from a single product or event, plaintiffs often resort to the mechanism of the class action, which promotes "efficiency and economy of litigation." (*Crown, Cork & Seal Co. v. Parker* (1983) 462 U.S. 345, 349.) But, unlike class actions in which common questions of law, fact, and proximate cause predominate among members of the plaintiff class, "mass-tort actions for personal injury most often are not appropriate for class action certification." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1123.) As this court has previously recognized, "[t]he major elements in tort actions for personal injury — liability, causation, and damages — may vary widely from claim to claim, creating a wide disparity in claimants' damages and issues of defendant liability, proximate cause, liability of skilled intermediaries, comparative fault, informed consent, assumption of the risk and periods of limitation." (*Ibid.*)

Yet, because mass tort injuries may involve diverse injuries or harm not amenable to the efficiency and economy of a class action, they present special problems for the proper functioning of the courts and the fair, efficient, and speedy administration of

justice. Without coordination, "those who win the race to the courthouse [and] bankrupt a defendant early in the litigation process" would recover but effectively shut out other potential plaintiffs from any recovery. (*In re Exxon Valdez* (9th Cir. 2000) 229 F.3d 790, 795-796.) Moreover, coordinated mass tort actions "also avoid the possible unfairness of punishing a defendant over and over again for the same tortious conduct." (*Id.* at p. 796.)

It is also important to note that many of the resident plaintiffs allege that Plavix caused them to suffer heart attacks, strokes, cerebral bleeding, and gastrointestinal bleeding. These are obviously severe medical conditions, and California has an interest in ensuring that litigation brought by its residents is resolved in a timely fashion. By separating the nonresident plaintiffs from the resident plaintiffs and forcing the nonresidents to sue in other states, it is fair to anticipate delays in the California proceedings that would be created by the litigation and appeals of discovery and factual conflicts in the various other forums. In that event, the California plaintiffs' litigation could be stalled for a significant period without resolution. Likewise, defendants would suffer the costs created by delay and uncertainty as to their potential liability, if any.

Moreover, the same concerns of delay and efficiency apply equally to the interstate judicial system. The other forums have an equally strong interest in the fair, efficient, and speedy administration of justice for both their resident plaintiffs and resident defendants. The consolidation of plaintiffs' claims in a single forum is a mechanism for promoting those interests.

Of course, the other potential forums also have a sovereign interest in seeing their laws applied to actions such as this one. But for purposes of establishing the propriety of personal jurisdiction, the high court has stated, "we do not think that such choice-of-law concerns should complicate or distort the jurisdictional inquiry." (*Keeton*, *supra*, 465 U.S. at p. 778.) Choice-of-law concerns might very well make a mass tort action unmanageable in certain circumstances, but that issue is not determinative at this stage of the proceedings.

Accordingly, BMS has failed to carry its burden of showing that the exercise of personal jurisdiction over it in this matter is unreasonable.

## III. CONCLUSION

We conclude that BMS, despite its significant business and research activities in California, is not at home in our state for purposes of asserting general personal jurisdiction over it. However, we conclude that in light of BMS's extensive contacts with California, encompassing extensive marketing and distribution of Plavix, hundreds of millions of dollars of revenue from Plavix sales, a relationship with a California distributor, substantial research and development facilities, and hundreds of California employees, courts may, consistent with the requirements of due process, exercise specific personal jurisdiction over nonresident plaintiffs' claims in this action, which arise from the same course of conduct that gave rise to California plaintiffs' claims: BMS's development and nationwide marketing and distribution of Plavix. BMS cannot establish unfairness: Balancing the burdens imposed by this mass tort action, and given

its complexity and potential impact on the judicial systems of numerous other jurisdictions, we conclude that the joint litigation of the nonresident plaintiffs' claims with the claims of the California plaintiffs is not an unreasonable exercise of specific jurisdiction over defendant BMS.

## IV. DISPOSITION

The judgment of the Court of Appeal is affirmed.

CANTIL-SAKAUYE, C. J.

WE CONCUR:

LIU, J.
CUÉLLAR, J.
KRUGER, J.

## DISSENTING OPINION BY WERDEGAR, J.

The court holds today that 592 plaintiffs residing in states other than California may sue Bristol-Myers Squibb Company (BMS) in a California superior court for injuries resulting from these plaintiffs' use in their own states of BMS's prescription drug, Plavix. Because BMS is not incorporated or based in California, its activities in the state are insufficient to establish general personal jurisdiction—jurisdiction for disputes unrelated to the company's California activities—over it in California courts. (Maj. opn., *ante*, at p. 2.) The majority, however, finds BMS's California contacts sufficient for specific, case-related personal jurisdiction, even though Plavix was not developed or manufactured in California and the nonresident plaintiffs did not obtain the drug through California physicians or from a California source, and despite the requirement for specific jurisdiction that there be a substantial connection between the plaintiff's claim and the defendant's forum activities. (*Id.* at pp. 16-28; see *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 452 (*Vons*).)

I respectfully dissent from the court's decision on personal jurisdiction. I agree the extent and type of contacts to support general jurisdiction are lacking. But I find in the record no evidence of contacts with California that bear a substantial connection to the claims of these nonresidents. I therefore would hold specific jurisdiction has also not been established.

On a defendant's motion to quash service of process, the plaintiff asserting jurisdiction bears the burden of proving the extent of the defendant's forum contacts and their relationship to the plaintiff's

claims. (*Vons*, *supra*, 14 Cal.4th at p. 449; *Gilmore Bank v. AsiaTrust New Zealand Ltd.* (2014) 223 Cal.App.4th 1558, 1568.) In this case, the nonresident plaintiffs (real parties in interest on BMS's petition for writ of mandate) have failed to show *any* substantial nexus, causal or otherwise, between their claims and BMS's activities in California.

One can imagine a number of factual circumstances that might justify specific jurisdiction in a case like this. Unfortunately, none of those circumstances have been established here:

If real parties in interest had purchased Plavix while in California or from a California source, their claims could be considered substantially related to BMS's sale of Plavix in this state. *But the record contains no evidence connecting the Plavix taken by any of the nonresident plaintiffs to California.*

If real parties had been prescribed Plavix by a California doctor, their misrepresentation claims might be considered substantially related to BMS's marketing of Plavix to physicians here. *But there is no evidence of a California connection through real parties' prescribing physicians.*

If the Plavix taken by real parties had been manufactured in California, one might well consider their defective product claims substantially connected to BMS's forum contacts. *But the record shows Plavix has never been manufactured in California.*

If the Plavix taken by real parties had been distributed to their respective states by codefendant McKesson Corporation, which is headquartered in

San Francisco, it could be argued real parties' defective product claims were related to the distribution agreement between BMS and McKesson. *But real parties have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them.*

If Plavix had been developed in California, real parties' defective product claims could be considered related to that California activity. *But the record shows Plavix was developed not in California but in New York and New Jersey, where BMS has, respectively, its headquarters and major operating facilities.*

If the labeling, packaging, or regulatory approval of Plavix had been performed in or directed from California, some of real parties' misrepresentation claims would arguably be related to those California activities. *But BMS did none of those things in California.*

Finally, if the "nationwide marketing" campaign on which the majority relies (maj. opn., *ante*, at p. 27) had been created or directed from California, claims of misrepresentations in that marketing would have arisen from BMS's California contacts. *But according to the record, none of that marketing work was performed or directed by BMS's California employees.*

In the absence of a concrete factual relationship between their claims and BMS's contacts with the forum state, on what do real parties, and the majority of this court, base their argument for specific jurisdiction over BMS in California courts? In brief, their argument rests on similarity of claims and joinder with California plaintiffs. First, real

parties' claims arise from activities *similar* to those BMS conducted in California, because in marketing and selling Plavix throughout the United States, BMS sold the same allegedly defective product in California as in real parties' various states of residence and presumably made some of the same misrepresentations and omissions in those states and in California. Second, real parties are *joined* in this action with plaintiffs who are California residents and who allege similar claims. Neither of these factors, however, creates a connection between real parties' claims of injury and BMS's California activities sufficient to satisfy due process.

By statute, the personal jurisdiction of California courts extends to the limits set by the state and federal Constitutions. (Code Civ. Proc., § 410.10.) Constitutional due process limits dictate that in the absence of general jurisdiction—which exists only if a corporation is incorporated in the forum state or conducts such intensive activities there as to make it "at home" in that state (*Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 564 U.S. 915, 919 (*Goodyear*))—personal jurisdiction over the corporation to adjudicate a particular claim (specific jurisdiction) is established only if the controversy "is related to or 'arises out of' " the company's activities in the forum state. (*Helicopteros Nacionales de Colombia v. Hall* (1984) 466 U.S. 408, 414 (*Helicopteros*).)

The majority's decision is not supported by specific jurisdiction decisions from the United States Supreme Court, this court, or the lower federal and state courts. (See pt. I, *post*.) And as I will discuss later (see pt. II, *post*), today's decision impairs

important functions of reciprocity, predictability, and limited state sovereignty served by the relatedness requirement. By weakening the relatedness requirement, the majority's decision threatens to subject companies to the jurisdiction of California courts to an extent unpredictable from their business activities in California, extending jurisdiction over claims of liability well beyond our state's legitimate regulatory interest.

Just as important, minimizing the relatedness requirement undermines an essential distinction between specific and general jurisdiction. In *Daimler AG v. Bauman* (2014) 571 U.S.___, ___ [187 L.Ed.2d 624, ___, 134 S.Ct. 746, 751], the United States Supreme Court made clear that general jurisdiction—jurisdiction to adjudicate controversies unrelated to the defendant's forum contacts—is not created merely by commercial contacts that are "continuous and systematic" (*Helicopteros, supra*, 466 U.S. at p. 416) but only by contacts so extensive as to render the defendant " 'at home' " in the forum state. (*Daimler, supra*, 187 L.Ed.2d at p. 761.) The majority applies that holding to conclude, correctly, that general jurisdiction is lacking here. (Maj. opn., *ante*, at pp. 13-16.) But by reducing relatedness to mere similarity and joinder, the majority expands specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction. At least for consumer companies operating nationwide, with substantial sales in California, the majority creates the equivalent of general jurisdiction in California courts. What the federal high court wrought in *Daimler*—a shift in the general jurisdiction standard from the

"continuous and systematic" test of *Helicopteros* to a much tighter "at home" limit—this court undoes today under the rubric of specific jurisdiction.

## I. The Case Law Does Not Support Specific Jurisdiction in These Circumstances

Specific jurisdiction over a defendant—jurisdiction to adjudicate a dispute connected to the defendant's contacts with the forum state—depends on the relationship among the defendant, the forum, and the litigation. (*Helicopteros*, *supra*, 466 U.S. at p. 414.) We have summarized the requirements for specific jurisdiction as threefold: (1) the defendant has purposefully availed itself of forum benefits; (2) the controversy arises out of or is otherwise related to the defendant's forum contacts; and (3) the assertion of personal jurisdiction in the particular litigation is reasonable in light of the burdens and benefits of forum litigation. (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062 (*Snowney*).)

BMS contests neither the first prong of this tripartite test, that the company has purposefully availed itself of forum benefits by its continuous course of substantial business activities in California, nor the third, that taking jurisdiction would impose unreasonable burdens on the company. (*Snowney*, *supra*, 35 Cal.4th at p. 1070.) The key issue here is therefore whether the claims of the real parties in interest (plaintiffs residing in states other than California) arise out of, or are otherwise related to, BMS's activities in California.

### A. *The Relatedness Requirement for Specific Jurisdiction*

The requirement that the litigation be related to the defendant's activities in or directed to the forum, by which it has purposefully availed itself of the benefits of doing business in the state, was first stated in the landmark decision of *Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310 (*International Shoe*). The high court first noted that jurisdiction is well established when a corporation's "continuous and systematic" activities in the state "give rise to the liabilities sued on." (*Id.* at p. 317.) Even when a corporation has engaged in only occasional activities in the state, due process may still be satisfied if those activities have created the obligations sued on: "[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (*Id.* at p. 319.)

In *International Shoe* itself, the relationship between the forum activities and the litigation was a straightforward one: The defendant corporation had employed salesmen in the State of Washington, which required it contribute to the state's unemployment compensation fund; the litigation concerned an assessment for unpaid contributions. (*International Shoe*, *supra*, 326 U.S. at pp. 312-313.) Thus "the obligation which is here sued upon arose

out of those very [forum] activities," making it reasonable for Washington "to enforce the obligations which appellant has incurred there." (*Id.* at p. 320.)

The United States Supreme Court has not, since *International Shoe*, greatly elaborated on its understanding of the relatedness requirement. The court in *Helicopteros* slightly reformulated the requirement: jurisdiction may be appropriate if the controversy "arise[s] out of or relate[s] to" the company's forum contacts. (*Helicopteros*, *supra*, 466 U.S. at p. 414.) But the high court did not explain or apply that standard in *Helicopteros*, and in *Goodyear*, *supra*, 564 U.S. at page 919, the court again used a different formulation, suggesting a narrower vision of relatedness: "Specific jurisdiction . . . depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, *activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation*." (Italics added.) The Goodyear court went on, very briefly, to explain why specific jurisdiction did not exist in the case before it, which involved the deaths of two North Carolina boys in an overseas bus accident: "Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy." (*Ibid.*) None of the injury-causing events having occurred in the forum state, the basis for specific jurisdiction was lacking.

Of the post-*International Shoe* decisions in which the high court actually found a factual basis for specific jurisdiction, each featured a direct link

between forum activities and the litigation. (See *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 479-480 [specific jurisdiction in Florida courts proper where franchise dispute "grew directly out of" contract formed between Florida franchisor and Michigan franchisee, whose breach "caused foreseeable injuries to the corporation in Florida"]; *Calder v. Jones* (1984) 465 U.S. 783, 789 [California jurisdiction over writer and editor based in Florida proper for article distributed in California and defaming California resident, where the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California" and they knew article "would have a potentially devastating impact" on California resident]; *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 776-777 (*Keeton*) [specific jurisdiction in New Hampshire courts proper over Ohio corporation where corporation's sale in New Hampshire of magazine defaming the plaintiff injured her reputation in that state]; *McGee v. International Life Ins. Co.* (1957) 355 U.S. 220, 223 [specific jurisdiction in California courts proper where action was based on a life insurance contract delivered in California and on which the insured, a California resident at his death, had paid premiums from the state].) Nothing in the high court's specific jurisdiction decisions suggests an abandonment or broad relaxation of the relatedness requirement.

This court did, in *Vons*, adopt a relatively broad standard for relatedness. After canvassing formulations put forward by scholars and lower courts, we held the relationship between the defendant's forum contacts and the plaintiff's claims in litigation need not be one of proximate legal

causation or even "but for" factual causation, nor need the forum contacts be substantively relevant in the plaintiff's action. (*Vons*, *supra*, 14 Cal.4th at pp. 460-475.) Rather, the relationship required for specific jurisdiction exists if the claims bear a "substantial nexus or connection" to the activities by which the defendant has purposefully availed itself of forum benefits. (*Id.* at p. 456; accord, *Snowney*, *supra*, 35 Cal.4th at pp. 1067-1068.) The test is not a mechanical one, but a weighing process in which "the greater the intensity of forum activity, the lesser the relationship required between the contact and the claim." (*Vons*, *supra*, at p. 453; accord, *Snowney*, *supra*, at p. 1068.) Specific jurisdiction in California courts is proper if "because of the defendants' relationship with the forum, it is not unfair to require that they answer in a California court for an alleged injury that is substantially connected to the defendants' forum contacts." (*Vons*, *supra*, at p. 453.)

Notwithstanding our relatively broad substantial connection standard, mere similarity of claims is an insufficient basis for specific jurisdiction. The claims of real parties in interest, nonresidents injured by their use of Plavix they purchased and used in other states, in no sense arise from BMS's marketing and sales of Plavix in California, or from any of BMS's other activities in this state. Nor is any other substantial connection apparent.

BMS promoted and sold Plavix in this state, giving rise to the California plaintiffs' claims. BMS also engaged in such promotion and sales in many other states, giving rise to claims by residents of those states. As all the claims derive from similar conduct and allege similar injuries, the nonresident plaintiffs'

claims closely resemble those made by California residents. But I can perceive no substantial nexus between the nonresidents' claims and BMS's California activities. In each state, the company's activities are connected to claims by those who obtained Plavix or were injured in that state, but no relationship other than similarity runs between the claims made in different states. As BMS argues, its California contacts fail to "intersect" with the nonresident plaintiffs' claims.

Even a commentator "sympathetic to an expanded role for specific jurisdiction" found the approach of the Court of Appeal in this case, which the majority in this court largely replicates, so overly broad as "to reintroduce general jurisdiction by another name." (Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States* (2015) 19 Lewis & Clark L.Rev. 675, 687 (hereafter Silberman).) "A more plausible specific jurisdiction forum might be the state where the drugs were manufactured or distributed to both the California and non-California plaintiffs; all plaintiffs' claims might be said to 'arise from' such defective manufacture and thereby provide an alternative single forum in which to have all the plaintiffs assert their claims. In *Bristol-Meyers* [*sic*], no such connection to California can be established for the non-California plaintiffs. The claims of the California and nonresident plaintiffs are merely parallel." (*Ibid.*, fn. omitted.)

One form of substantial connection between a defendant's forum activities and the claims against it exists when the forum activities are legally relevant to establish the claims. (*Vons, supra*, 14 Cal.4th at

p. 469.) In that situation, the forum state's interest in regulating conduct occurring within its borders is implicated, as the plaintiff is seeking to impose liability, at least in part, for acts the defendant committed in the forum state. (*Id.* at p. 472.) But no such legal relevance connection is apparent here. The nonresident plaintiffs' claims rest on allegations that BMS deceptively marketed and sold Plavix to them or their prescribing physicians, but, as noted earlier, the record is devoid of any suggestion, nor do real parties claim, the nonresident plaintiffs bought or were prescribed Plavix from a California source. BMS's marketing and sales activities in California thus appear irrelevant to real parties' claims. To quote BMS's brief, the nonresident plaintiffs' claims "would be exactly the same if BMS had never set foot in California, had never engaged in any commercial activity in California, had never sold any product here, and had engaged only non-California distributors."

In addition to its interest in regulating conduct within its borders, each state has an interest in providing a judicial forum for its injured residents, regardless of whether the conduct sued on occurred in the state. (*Vons, supra*, 14 Cal.4th at pp. 472-473.) "[T]he state has a legitimate interest as sovereign in providing its residents with protection from injuries caused by nonresidents and with a forum in which to seek redress. This assertion of sovereignty with respect to nonresident defendants is fair when those defendants have availed themselves of certain benefits within the state and the claim is related to those contacts." (*Id.* at p. 473.) But reference to the state's interest in providing a forum

for its residents to seek legal redress is of no help to real parties in interest here, as they are not California residents. California has no discernable sovereign interest in providing an Ohio or South Carolina resident a forum in which to seek redress for injuries in those states caused by conduct occurring outside California. A mere resemblance between the nonresident plaintiffs' claims and those of California residents creates no sovereign interest in litigating those claims in a forum to which they have no substantial connection.

The majority argues that taking jurisdiction over the nonresidents' claims furthers a California interest because evidence of their injuries may be admissible to help the California plaintiffs prove Plavix was a defective product. (Maj. opn., *ante*, at p. 32.) But admissibility of other injuries does not depend on joinder of the other injured person, as the cases the majority cites illustrate. In neither *Ault v. International Harvester* (1974) 13 Cal.3d 113 nor *Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, where evidence of prior similar injuries was held admissible, were those injured in the prior accidents joined as parties in the action.

The majority also suggests that jurisdiction over the nonresidents' claims is proper because California law attempts to "protect[] consumers from the potential dangers posed by prescription medication." (Maj. opn., *ante*, at p. 33.) The statutes cited, however, regulate the dispensing of prescription drugs by California pharmacists (Bus. & Prof. Code, §§ 4070–4078), while the claims at issue in this case are against BMS, a drug manufacturer. Moreover, real parties in interest have neither alleged nor

proven they were prescribed or furnished Plavix in California. How the cited California laws might apply to their claims is thus unclear, to say the least.

In the same passage, the majority implies that the activity of BMS's California sales representatives, whose representations California has an interest in regulating, might somehow be related to real parties' claims. (Maj. opn., *ante*, at p. 33.) In this instance as well, the majority ignores the complete absence of evidence showing any such relationship. Real parties in interest, who have the burden of proving forum contacts related to their claims, have not even attempted to establish that sales representatives in California misled physicians *in other states* about Plavix's efficacy and safety. While no doubt correct California has an interest in regulating dangerous conduct within our state (maj. opn, *ante*, p. 33, fn. 6), the majority neglects to explain how that interest can be served by taking jurisdiction to adjudicate the claims of persons unaffected by any such conduct.

Finally, the majority asserts that California's interest in regulating the conduct of codefendant McKesson Corporation (McKesson), a pharmaceutical distributor headquartered in California, justifies adjudicating real parties' claims against BMS in a California court. (Maj. opn., *ante*, at pp. 33-34.) Of all the majority's red herrings, this is perhaps the ruddiest. Why plaintiffs sued McKesson as well as BMS is not obvious—BMS suggests it was merely to avoid removal to federal court (see 28 U.S.C. § 1441(b)(2))—but at no point have real parties argued McKesson bore any responsibility in providing them with Plavix. In their brief on the merits, real parties contended

BMS's relationship with McKesson helped BMS make substantial profits "within California," and at oral argument their attorney acknowledged he had no evidence tying McKesson to the Plavix that allegedly injured real parties outside this state. The notion of a connection between McKesson's conduct in California and the claims of real parties in interest, which arise from their acquisition and use of Plavix in other states, is purely a product of the majority's imagination.

Notwithstanding the majority's speculative suggestions, as far as the record shows real parties' claims arise solely from conduct in other states and do not implicate California's legitimate interest in regulating conduct within its borders.

*B. Jurisdiction Over Liability Claims for Pharmaceutical Drugs*

Neither real parties in interest nor the majority cites any decision, state or federal, finding specific jurisdiction on facts similar to those here. In fact, courts in both systems have *rejected* jurisdiction over drug defect claims made by plaintiffs who neither reside in nor were injured by conduct in the forum state.

In *Boaz v. Boyle & Co.* (1995) 40 Cal.App.4th 700 (*Boaz*), a group of plaintiffs, mostly residents of New York and New Jersey, but including one California resident, sued several manufacturers of the drug DES for injuries allegedly resulting from their grandmothers' ingestion of the drug in New York. (*Id.* at p. 704.) The appellate court affirmed the dismissal of the action against defendant Emons Industries, Inc., which was not subject to California's general jurisdiction, holding the basis for specific

jurisdiction was also lacking as the defendant's activities in California were unrelated to the plaintiffs' injuries. (*Id.* at p. 705.) "It is conceded that none of appellants' grandmothers, who ingested DES, did so in California. Nor did any of them acquire the product as the result of any of Emons's activities related to California. Indeed, as we have seen, none of them except [the single California resident] has any connection with this state." (*Id.* at p. 718.) Though the defendant had sold DES in California as it had in other states, that similarity of conduct did not subject it to personal jurisdiction for the purposes of adjudicating the out-of-state plaintiffs' claims, though, as the court noted, jurisdiction might be appropriate "in a case arising out of ingestion in California or by purchase or prescription in California of DES." (*Id.* at p. 721.)[1] As in the present case, none of those facts had been or could be established.

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[1] As to the California resident, the *Boaz* court reasoned jurisdiction was lacking because her grandmother had not taken DES in California and therefore "any DES-related affliction she suffers has nothing to do with any of Emons's activities related to California." (*Boaz*, *supra*, 40 Cal.App.4th at p. 718.) The court may have gone too far in this respect; California's interest in providing a forum for its residents to seek redress for actions having injurious effects in the state arguably justified specific jurisdiction over the California resident's claims. For the same reason, *In re DES Cases* (E.D.N.Y. 1992) 789 F.Supp. 552 can be distinguished as involving the claims of New York residents seeking a remedy for injuries occurring in New York; although the defendants challenging jurisdiction there did not market DES in New York, they bore legal responsibility for injuries there under the state's rule of market share liability. (See *id.* at pp. 592-593.)

*Glater v. Eli Lilly & Co.* (1st Cir. 1984) 744 F.2d 213, presented a similar fact pattern in an individual suit. The plaintiff there sued a DES manufacturer in a federal court in New Hampshire for injuries she allegedly suffered from *in utero* exposure to the drug. The plaintiff's mother took the drug in Massachusetts, where she lived. (*Id.* at p. 214.) That the manufacturer had marketed DES nationwide, including in New Hampshire, was insufficient to support specific jurisdiction: Although Lilly marketed and sold DES nationwide, including in New Hampshire, "Glater's cause of action did not arise from Lilly's New Hampshire activities; rather, her injuries were caused in Massachusetts by exposure *in utero* to DES which her mother purchased and consumed in Massachusetts." (*Id.* at p. 216.) Were the defendant's New Hampshire contacts deemed sufficiently related to the cause of action arising in Massachusetts, the court "would be obliged to hold that *any* plaintiff in Glater's position—a nonresident injured out of state by a drug sold and consumed out of state—could bring suit in New Hampshire for DES injuries." (*Id.* at p. 216, fn. 4.) Such "retributive jurisdiction" over claims unconnected to the forum "comports with neither logic nor fairness." (*Ibid.*; accord, *Seymour v. Parke, Davis & Company* (1st Cir. 1970) 423 F.2d 584, 585, 587 [suit in New Hampshire over drug taken and allegedly causing injury in Massachusetts "did not arise [in New Hampshire], or as a result of anything which occurred there" and hence was an "unconnected cause[] of action" that could only be justified by general jurisdiction, the basis for which was also lacking].)

Also similar, though less extensively reasoned as to specific jurisdiction, is *Ratliff v. Cooper Laboratories, Inc.* (4th Cir. 1971) 444 F.2d 745. That decision addressed two consolidated cases brought in a federal court in South Carolina, both by residents of other states who bought and consumed the allegedly harmful drugs (not named in the decision), against drug manufacturers that conducted business in South Carolina but were not incorporated or headquartered there and had not made the subject drugs there. (*Id.* at p. 746.) The court observed that the plaintiffs were not residents of South Carolina and their causes of action —arose outside the forum and were unconnected with the defendant's activities in South Carolina." (*Id.* at p. 747.) Noting "the lack of a 'rational nexus' between the forum state and the relevant facts surrounding the claims presented" such as would support specific jurisdiction, the court moved on to general jurisdiction (for which it also found the forum contacts insufficient). (*Id.* at p. 748.)

In all these cases, the defendants had sold their pharmaceutical drugs in the forum state. Indeed, in *Boaz*, California physicians accounted for 9 percent of the defendant's DES sales. (*Boaz*, *supra*, 40 Cal.App.4th at p. 715.)[2] Yet these courts—

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[2] The majority (maj. opn., *ante*, at p. 25) notes that the defendant in Boaz, unlike BMS, did not employ salespeople or maintain offices in the state. Yet through "advertising in selected professional magazines and professional journals, and targeted mailings of samples and brochures to obstetricians and gynecologists," all "done on a national scale" (*Boaz*, *supra*, 40 Cal.App.4th at p. 715), the company sold a large amount of DES—the same product at issue in the disputed lawsuits—in California. Like BMS, then, the defendant in *Boaz* "enjoyed

correctly, in my view—considered that forum activity to be unconnected to the plaintiffs' claims, which arose from use of the drugs in other states. Not until today's decision has specific jurisdiction over a drug liability claim arising from the nonresident plaintiff's purchase, use, and injury *outside* the forum state been premised on the fact that the defendant also sold the drug in the forum state.

*C. Specific Jurisdiction Decisions Relied on by Real Parties*

Turning from pharmaceutical liability to the broader case law, we see that none of the decisions real parties cite support specific jurisdiction based, as here, on the mere *resemblance* between the disputed claims and distinct claims brought by other plaintiffs that arose from the defendant's forum contacts. Each of these cited cases involved a substantial connection between the defendant's activities in the forum state and the plaintiff's claims, not merely a connection between the forum activities and similar claims made by other plaintiffs.

In *Cornelison v. Chaney* (1976) 16 Cal.3d 143 (*Cornelison*), a California resident sued for the wrongful death of her husband, who died in an automobile accident in Nevada. The defendant, a Nebraska resident, was a trucker hauling goods in interstate commerce. He made approximately 20 trips to California each year and was en route to this state with a shipment when his truck collided with

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sizeable revenues from the sales of its product here." (Maj. opn., *ante*, at p. 26.) Why the absence of other, dissimilar ties should serve to distinguish the case is unclear.

the decedent's vehicle in Nevada, near the California border. (*Id.* at pp. 146-147.)

We concluded the plaintiff's cause of action did bear a substantial connection to the defendant's business activities in California: "As we have seen, defendant has been engaged in a continuous course of conduct that has brought him into the state almost twice a month for seven years as a trucker under a California license. The accident occurred not far from the California border, while defendant was bound for this state. He was not only bringing goods into California for a local manufacturer, but he intended to receive merchandise here for delivery elsewhere. The accident arose out of the driving of the truck, the very activity which was the essential basis of defendant's contacts with this state. These factors demonstrate, in our view, a substantial nexus between plaintiff's cause of action and defendant's activities in California." (*Cornelison*, *supra*, 16 Cal.3d at p. 149.) In further support, we observed that California had an interest in providing a forum for the litigation because the plaintiff was a California resident. (*Id.* at p. 151.)

*Cornelison* has in common with the present case that the plaintiff's injury arose directly from the defendant's conduct outside California. But in *Cornelison* the defendant's out-of-state conduct, his allegedly negligent driving in Nevada, was directed (literally) toward California and resulted in injury to a California resident. The connections to California that justified jurisdiction in *Cornelison* are missing from the claims of real parties in interest here.

In *Vons*, *supra*, 14 Cal.4th 434, we held specific jurisdiction proper over two restaurant franchisees

based and operating in Washington State. In multiparty litigation arising out of food poisoning incidents at their and other Jack-in-the-Box restaurants, the supplier of the allegedly tainted meat (Vons Companies, Inc. (Vons)) cross-complained against several franchisees, including the Washington franchisees, alleging their failure to cook the meat properly caused the poisoning. (*Id.* at pp. 440-441.) Among other contacts with California, the franchisees had executed the franchise agreements, which specified methods of preparing Jack-in-the-Box food products, in California, did regular business with the franchisor at its headquarters in San Diego, and had officers attend training sessions offered by the franchisor in California. (*Id.* at pp. 442-443.)

We held Vons's claims against the franchisees bore a substantial relationship to their contacts with California for two reasons: first, the franchise relationship—formed in California, under which the franchisees bought meat Vons supplied to the franchisor—had drawn Vons and the franchisees into a relationship as alleged joint tortfeasors, with certain joint liabilities and rights of indemnification, rights upon which Vons' cross-complaint in part rested; second, the franchise relationship, by imposing uniform standards for cooking food, buying equipment, and training employees, was itself an alleged source of Vons' injuries, which Vons traced to the " 'systematically deficient' " procedures required by the franchisor. (*Vons*, *supra*, 14 Cal.4th at pp. 456–457.)

Real parties in interest rely on *Vons* for the propositions that for specific jurisdiction to be

justified the defendant's forum activities need not be directed at the plaintiff or directly give rise to the plaintiff's claims. (See *Vons, supra*, 14 Cal.4th at pp. 453, 457.) Both points are well taken. Nonetheless, in *Vons* the connection between the forum activities and the claim was far more substantial than in the present case. By their activities in California, including the formation of franchise relationships, the franchisees in *Vons* established the conditions that would ultimately allow the franchisor's meat supplier, Vons, to seek indemnity for their joint liability and redress for its own injuries. The franchisees' forum activities were not directed at Vons, with which they had no direct relationship, and may not have proximately given rise to Vons's claims, but by establishing a franchise relationship pursuant to which the franchisees bought Vons's meat and prepared it according to methods set out in the franchise agreement, they set the stage for those claims, to say the least. No such nexus is apparent here, where BMS's marketing and sales of Plavix in California did nothing to establish the circumstances under which it allegedly injured plaintiffs in other states.

Finally as to California cases, real parties in interest cite *Snowney, supra*, 35 Cal.4th 1054, in which we held a California resident could sue a group of Nevada hotels in a California court for the hotels' failure to provide notice that they would impose an energy surcharge on their room prices. (*Id.* at p. 1059.) In a relatively brief discussion of the relatedness issue (the bulk of our analysis concerned the question of purposeful availment), we held the plaintiff's claims had a substantial connection to the

defendants' California forum activities because the plaintiff's false advertising and unfair competition claims were based on the hotels' alleged omissions in their California advertising and in the reservation process. (*Id.* at p. 1068.) "Because the harm alleged by plaintiff relates directly to the content of defendants' promotional activities in California, an inherent relationship between plaintiff's claims and defendants' contacts with California exists." (*Id.* at p. 1069.)

Real parties rely on *Snowney* for its adherence to the substantial connection test articulated in *Vons* and for its reiteration of *Vons*'s statements that the required intensity of forum contacts and connection of the claim to those contacts are inversely related (the greater the contacts, the less of a relationship need be shown) and that the forum contacts need not be directed at the plaintiff or give rise directly to the plaintiff's claim. (See *Snowney*, *supra*, 35 Cal.4th at p. 1068.) I find those principles unavailing in this case. However intense the defendant's activities in California, they must still bear a substantial relationship to the plaintiff's claims, and neither *Snowney* nor any of the other decisions real parties cite suggests that a mere resemblance between the plaintiff's claims and those made by other plaintiffs that are based on the defendant's California contacts establishes a substantial connection.

*Cornelison*, *Vons* and *Snowney* establish that we do not demand the relationship between the defendant's California contacts and the plaintiff's claims be causal or direct. They do not, however, support specific jurisdiction on the tenuous basis of a *resemblance* to other claims by other plaintiffs. (See

*Greenwell v. Auto-Owners Ins. Co.* (2015) 233 Cal.App.4th 783, 801 [*Vons* and *Snowney* require a *substantial* connection between the plaintiff's claims and the defendant's forum contacts; test is not satisfied whenever there is "*any relationship at all*"].)

In *Keeton*, *supra*, 465 U.S. 770, the United States Supreme Court upheld the assertion of specific jurisdiction in New Hampshire to adjudicate the libel claims of a New York resident against an Ohio corporation with its principal place of business in California. (*Id.* at pp. 772-774.) The high court found the defendant's regular circulation of magazines in New Hampshire was sufficient to support the state's jurisdiction over a libel claim based on the magazine's contents, even though the plaintiff could, under the " 'single publication rule' " followed in New Hampshire, recover damages from publication of the magazine throughout the United States. (*Id.* at pp. 773-774.) The court emphasized that the plaintiff was suing, in part, for damages she suffered in New Hampshire, "[a]nd it is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State." (*Id.* at p. 776.)

Unlike the plaintiff in *Keeton*, real parties in interest suffered no injury in California or from BMS's conduct in California. They nonetheless argue *Keeton* is analogous because the plaintiff there sought recovery, in large part, for injuries incurred outside the forum state. For two reasons, however, the analogy does not hold.

First, the single publication rule at work in *Keeton* was a state law rule governing the measure of damages for defamation, not one governing the

joinder of claims or claimants. The propriety of that state law damages rule was not itself a jurisdictional issue; rather, the question was whether personal jurisdiction in New Hampshire violated due process *given* the state's single publication rule (and its unusually long statute of limitations). (*Keeton*, *supra*, 465 U.S. at pp. 773-774.) In contrast, BMS's motion to quash service of summons as to the claims of the nonresident plaintiffs directly presents the jurisdictional issue as to those plaintiffs. We ask whether the superior court may take jurisdiction over defendant to adjudicate those claims, and are not required to decide whether the *entire* suit, including the claims of the California residents, would be subject to dismissal for lack of jurisdiction if the nonresidents' claims were included in it.

Second, New Hampshire had an interest in adjudicating the out-of-state damages that does not translate to the factual context of this case. (See *Keeton*, *supra*, 465 U.S. at p. 777.) To prevent the extraordinary burden on courts and litigants of having a defamation plaintiff sue separately in 50 states—and to allow effective application of a statute of limitations for publications that continue or recur over lengthy periods—most states have adopted the single publication rule, allowing only a single action per publication, but one in which all damages from the publication may be recovered. (See Civ. Code, § 3425.3 [Cal. Uniform Single Publication Act]; *Christoff v. Nestlé USA, Inc.* (2009) 47 Cal.4th 468, 477-479; see also *Keeton*, *supra*, at p. 778.)

On the facts of this case, there is no analogous state interest of similar force that would justify California courts adjudicating the nonresident

plaintiffs' claims. This is not a case in which the individual California plaintiffs would be stymied by procedural obstacles or restrictive damages rules were the nonresidents excluded from the action. Plaintiffs allege they suffered "severe physical, economic and emotional injuries" from their use of Plavix, including bleeding ulcers, gastrointestinal bleeding, cerebral bleeding, heart attack and stroke. Even if some of the California plaintiffs might have individual claims too small to justify suit, the consolidation of scores of such claims from within California would remedy that insufficiency without the addition of hundreds of nonresidents' claims. California can thus provide an effective forum for its residents to seek redress without joining those claims to similar claims by nonresidents. Nor does this case raise the specter of a continually restarting statute of limitations that would subject defendants like BMS to the harassment of unending suits for the same conduct (see *Christoff v. Nestlé USA, Inc.*, *supra*, 47 Cal.4th at p. 478), as was the case with the defamation suit in *Keeton*.

The majority argues jurisdiction over nonresidents' claims is justified by the efficiencies of litigating all claims arising from a "mass tort" in a single forum and by the existence of a complex litigation division in San Francisco Superior Court "well suited to expeditiously handle such large cases." (Maj. opn., *ante*, at pp. 35, 34.) If these 678 plaintiffs were all the injured Plavix users in the United States, and the only options for the nonresident plaintiffs were participation in this action or individual actions in their home states, then joint proceedings in California would likely be the most efficient

procedure, though the extent of that efficiency would depend on how choice of law questions are resolved, among other factors. (See Silberman, *supra*, 19 Lewis & Clark L.Rev. at p. 687 ["As for the efficiency arguments relied on by the California appeals court, only the issue of the defective quality of the drug is common to all the claims."].)

But these plaintiffs do not constitute the entire universe of those claiming injury from Plavix—far from it—and real parties' options are not limited to joining this action or each bringing separate actions in their respective states. In addition to consolidated multidistrict federal litigation in the District of New Jersey, individual, mass or representative actions have been brought in several other states.[3] Whether

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[3] See *In re Plavix Marketing, Sales Practices and Products Liability Litigation (No. II)* (U.S. Jud. Panel Multidist. Litig. 2013) 923 F.Supp.2d 1376, 1379-1381 (centralizing in District of New Jersey litigation arising in that state and in Illinois, Iowa, Louisiana, New York, and Pennsylvania, and potentially centralizing additional actions from California and Mississippi); *Mills v. Bristol-Myers Squibb Co.* (D.Ariz., Aug. 12, 2011, No. CV 11-968-PHX-FJM) 2011 WL 3566131, at *1 (individual action); *Hawaii ex rel. Louie v. Bristol-Myers Squibb Co.* (D.Hawaii, Aug. 5, 2014, No. CIV. 14-00180 HG-RLP) 2014 WL 3865213, at *2 (parens patriae action brought by the Attorney General of Hawaii remanded to state court); *Davidson v. Bristol-Myers Squibb Co.* (S.D.Ill., Apr. 13, 2012, No. CIV. 12-58-GPM) 2012 WL 1253165, at *5 (action by 83 plaintiffs remanded to state court); *Boyer v. Bristol-Myers Squibb Co.* (S.D.Ill., Apr. 13, 2012, No. CIV. 12-61-GPM) 2012 WL 1253177, at *5 (same, as to action by 71 plaintiffs); *Anglin v. Bristol-Myers Squibb Co.* (S.D.Ill., Apr. 13, 2012, No. CIV. 12-60-GPM) 2012 WL 1268143, at *5 (same, as to action by 67 plaintiffs); *Tolliver v. Bristol-Myers Squibb Co.* (N.D.Ohio, July 30, 2012, No. 1:12 CV 00754) 2012 WL 3074538, at *1 (individual action); *Employer Teamsters-Local Nos. 175/505 Health and Welfare*

or not real parties' claims are heard together with those of the California plaintiffs, inefficiency and the potential for conflicting rulings will exist so long as actions are simultaneously pending in several state and federal courts. (See generally Miller, *Overlapping Class Actions* (1996) 71 N.Y.U. L.Rev. 514, 520-525.)

No mechanism exists for centralizing nationwide litigation in a state court; there is no means by which pending actions in Illinois courts, for example, can be transferred to a California court. The San Francisco Superior Court, no matter how well equipped for trying complex cases, cannot adjudicate the entire dispute between injured Plavix users and BMS. If efficiency is the goal, federal litigation centralized through the multidistrict procedure offers a more promising path than a series of uncoordinated state and federal court actions.

*Keeton*, in which jurisdiction was found proper despite a state law rule allowing damages for out-of-state injuries, thus fails to support real parties' contention that jurisdiction over litigation brought by nonresident plaintiffs whose claims arose in other states may be obtained by joining their cases to similar ones brought by California plaintiffs. Such jurisdiction by joinder, moreover, would run counter to the holding of *Hanson v. Denckla* (1958) 357 U.S. 235 (*Hanson*).

In *Hanson*, the high court held a Florida court considering the validity of a trust created in

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*Trust Fund v. Bristol-Myers Squibb Co.* (S.D.W. Va. 2013) 969 F.Supp.2d 463, 466 (action by third party payors alleging misleading and false marketing of Plavix).

Delaware did not have personal jurisdiction over the Delaware trustee, who had performed no relevant acts in Florida (357 U.S. at p. 252),[4] even though other parties to the dispute resided in Florida and could be brought before the Florida court: "It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise personal jurisdiction over the nonresident trustees. This is a non sequitur. With personal jurisdiction over the executor, legatees, and appointees, there is nothing in federal law to prevent Florida from adjudicating concerning the respective rights and liabilities of those parties. But Florida has not chosen to do so. As we understand its law, the trustee is an indispensable party over whom the court must acquire jurisdiction before it is empowered to enter judgment in a proceeding affecting the validity of a trust. It does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation." (*Id.* at p. 254, fn. omitted.)

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[4] The majority's account of *Hanson* as resting solely on the purposeful availment prong of the specific jurisdiction test (maj. opn., *ante*, at p. 26, fn. 3) is incomplete. The trust settlor in *Hanson* had moved to Florida after establishing the trust; the trustee then paid the settlor trust income in that state and received from her directions for trust administration, including the execution of two powers of appointment. (*Hanson*, *supra*, 357 U.S. at p. 252 & fn. 24.) But because the litigation concerned the validity of the trust agreement itself (*id.* at p. 253), the cause of action was "not one that arises out of an act done or transaction consummated in the forum State." (*Id.* at p. 251.) *Hanson*'s holding was thus based on the lack of a relationship between the litigation and the defendant's forum contacts as well as on the paucity of those contacts.

It is likewise a non sequitur to argue that because many Californians have sued BMS for injuries allegedly caused by their use of Plavix, and the superior court's jurisdiction to address their claims is not disputed, the claims of nonresidents injured in other states should also be adjudicated here. California might or might not be an especially convenient and efficient forum for nationwide Plavix litigation, but joinder of California plaintiffs cannot confer personal jurisdiction over BMS to adjudicate claims that do not arise out of, and are not otherwise related to, BMS's business activities in California.

The majority posits two bases for deeming BMS's California activities related to the nonresident plaintiffs' claims. First, despite a silent factual record on this point, the majority infers that BMS employed the "same . . . assertedly misleading marketing and promotion" in California as in the states where real parties resided and were allegedly injured.[5] (Maj. opn., *ante*, at p. 23.) I have shown above that neither the case law nor an analysis of forum state interests supports basing specific jurisdiction on a similarity between activities in the forum state and those outside the forum. Characterizing BMS's multistate marketing activities as "coordinated" (maj. opn., *ante*, at p. 24) adds nothing to the jurisdictional argument given that, as the majority concedes, the record shows BMS's marketing campaign for Plavix was

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[5] Despite relying on BMS's nationwide marketing of Plavix as a basis for jurisdiction, and despite bearing the burden of proof on contacts and relatedness, real parties in interest introduced no evidence of particular marketing materials or broadcasts deployed in any state.

coordinated from New York and New Jersey rather than from California. The majority's supposition that California courts have personal jurisdiction over an out-of-state defendant to adjudicate a claim arising from deceptive advertising in, say, Maryland because the defendant used a common marketing strategy in California, Maryland and other states is without rational foundation.

Nor does calling BMS's nationwide marketing of Plavix a "course of conduct" (maj. opn., *ante*, at pp. 24, 25, 36) advance the majority's cause. As already noted (fn. 5, *ante*), real parties introduced no evidence of marketing materials or broadcasts used in any state. Other than that some degree of commonality existed, which BMS conceded, the extent of marketing overlap among the states is simply unknown. Certainly, this record provides no basis for assuming that real parties and the California plaintiffs were all injured by a single television broadcast made simultaneously in every media market or a single print advertisement published simultaneous in newspapers and magazines throughout the nation. This is not a case, that is to say, of a single act injuring plaintiffs in multiple states at one blow, where the argument for common jurisdiction might be stronger. All that appears is that Plavix was marketed nationwide and that BMS may have used many of the same materials—none of them generated in California—in various states. Such similarity of causes is not sufficient to give our courts jurisdiction over all claims, wherever they arise, based on misrepresentations or omissions in a company's marketing materials.

Second, the majority notes that BMS maintains some research facilities in California, although the majority concedes Plavix was not developed in those facilities.[6] (Maj. opn., *ante*, at p. 24.) This second ground of relatedness is both illogical and startling in its potential breadth. Because BMS has performed research on other drugs in California, claims of injury from Plavix may, according to the majority, be adjudicated in this state. Will we in the next case decide that a company may be sued in California for dismissing an employee in Florida because on another occasion it fired a different employee in California, or that an Illinois resident can sue his automobile insurer here for bad faith because the defendant sells health care policies in the California market? The majority points to no substantial connection between Plavix claims arising in other states and research on unspecified other products in this state.

## II. The Relatedness Requirement Serves Important Functions and Should Not Be Minimized

As shown in part I, *ante*, the case law on specific jurisdiction does not support a California court taking jurisdiction over nonresident plaintiffs' claims, arising from their use of Plavix in other states. BMS marketed and sold Plavix to other plaintiffs within

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[6] This is not a matter of the absence of evidence. In support of its motion to quash service, a BMS executive submitted a declaration stating that "none of the work to develop Plavix took place in California," and that all development, manufacture, labeling, and marketing of Plavix was performed or directed from New York or New Jersey; none was accomplished or directed by California employees.

California, but those forum activities are not substantially related to the nonresident plaintiffs' claims. In the absence, however, of any United States Supreme Court decisions closely on point, stare decisis does not prevent the majority from giving the relatedness requirement scant consideration, while relying on its theory that the asserted benefits of consolidating multistate claims in California outweigh the burdens for BMS of defending real parties' claims here together with those of the California plaintiffs. (Maj. opn., *ante*, at pp. 29-35.) Nevertheless, this approach is, in my view, a serious mistake. By essentially ignoring relatedness and merely satisfying itself that defendant is not being haled into an inconvenient forum where it has no significant contacts, the majority blurs the distinction between general and specific jurisdiction and impairs the values of reciprocity, predictability, and interstate federalism served by due process limits on personal jurisdiction.

Reciprocity, in this context, refers to the idea that the litigation to which a defendant is exposed in a particular forum should bear some relationship to the benefits the company has sought by doing business in the state. (See Moore, *The Relatedness Problem in Specific Jurisdiction* (2001) 37 Idaho L.Rev. 583, 599 ["The party has garnered the benefits offered by the government in which the court sits. These benefits include the laws, the administrative framework and their restraining effects. In return, the party concedes to that government a quantum of power to govern his conduct, a power which he himself holds in a natural autonomous state."].) Such reciprocity is most

clearly maintained by the state taking jurisdiction over disputes arising directly from the defendant's activities in the state. As the high court said in *International Shoe*, where "[t]he obligation which is . . . sued upon arose out of those very activities," it will generally be "reasonable and just . . . to permit the state to enforce the obligations which appellant has incurred there." (*International Shoe*, *supra*, 326 U.S. at p. 320.)

More broadly, enforcing a meaningful relatedness requirement ensures some degree of reciprocity; because the forum's assertion of jurisdiction cannot encompass disputes that have no substantial connection with the defendant's forum activities, the liabilities to which the defendant is exposed in the forum will tend to bear a relationship to the benefits it has sought in doing business there. "Relationship helps test whether the benefits and burdens are similar. When a suit concerns the activities from which the corporation received in-state benefits, there is some similarity in the burden imposed by the assertion of jurisdiction. . . . Relatedness may be a rough measure, but it placed a logical limit on the burdens arising from in-state activities." (Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness"* (2005) 58 SMU L.Rev. 1313, 1345-1346 (hereafter Andrews).)

Relatedness bears on predictability in much the same way. "In order for a business to properly structure its behavior—set consumer costs, procure insurance, or sever its relationship with a particular state—it must not only know that a contact has been made in a particular state (an aim protected through

the purposeful availment standard), but it also must have some minimal appreciation of the effect of that contact. The relationship standard helps give this knowledge. If a business entity chooses to enter a state on a minimal level, it knows that under the relationship standard, its potential for suit will be limited to suits concerning the activities that it initiates in the state." (Andrews, *supra*, 58 SMU L.Rev. at p. 1346; see *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297 (*World-Wide Volkswagen*) [observing that when a corporation sells its products in a state, "it has clear notice that it is subject to suit there," and jurisdiction over a suit would not be unreasonable "if its allegedly defective merchandise has there been the source of injury to its owner or to others."].)

Finally, limiting specific jurisdiction to litigation that is substantially connected to the defendant's forum activities prevents states from straying beyond their legitimate regulatory spheres. Appropriately limited, specific jurisdiction "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." (*World-Wide Volkswagen*, *supra*, 444 U.S. at p. 292.) As the high court explained in Hanson, the growth in interstate commerce and the easing of communications and transportation may have tempered, but they have not eliminated, the role that territorial limits on state regulation play under due process. Due process restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of

the respective States." (*Hanson*, *supra*, 357 U.S. at p. 251.)

Expanding on this point in *World-Wide Volkswagen*, the court explained that while the Constitution's Framers foresaw a nation of economically interdependent states, they "also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." (*World-Wide Volkswagen*, *supra*, 444 U.S. at p. 293.) Thus even in the modern era due process limits on personal jurisdiction retain a territorial aspect: "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." (*Id.* at p. 294; accord, *J. McIntyre Machinery, Ltd. v. Nicastro* (2011) 564 U.S. 873, 879 (plur. opn. of Kennedy, J.) ["The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. . . . This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with

respect to the power of a sovereign to prescribe rules of conduct for those within its sphere."].)[7]

The relatedness requirement for specific jurisdiction plays a key role in implementing these interstate federalism limits. By conducting business within a state or directing its efforts at the state, a company brings its activities within the state's core regulatory concerns. Litigation that arises from those activities falls squarely within the state's sovereign power to adjudicate. In contrast, litigation arising outside the state is unlikely to be a fit subject for state court adjudication except to the extent it involves state residents. "A state has sovereignty with regard to activity conducted within its borders, and it thus has power over claims arising from that activity. . . . A state seemingly has no sovereignty over activity that neither involves its citizens nor occurs within its borders." (Andrews, *supra*, 58 SMU L.Rev. at p. 1347.) Relatedness thus "helps limit the reach of states so that they do not exceed legitimate state interests." (*Id.* at p. 1348.) As this court remarked (in a choice of law discussion, but with equal applicability to jurisdiction), our state's

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[7] In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee* (1982) 456 U.S. 694, 703, footnote 10, the high court noted that concern for federalism is not "an independent restriction on the sovereign power of the court," but rather "a function of the individual liberty interest preserved by the Due Process Clause," waivable by the party. Though not an independent, unwaivable restriction on jurisdiction, interstate federalism remains an important consideration in determining how the due process limits on jurisdiction should be applied. "The defendant has a due process right to have states act only within the limits of their sovereignty." (Andrews, *supra*, 58 SMU L.Rev. at p. 1347.)

legitimate regulatory interest does not ordinarily extend to measures aimed at "alter[ing] a defendant's conduct in another state vis-à-vis another state's residents." (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 104, italics omitted.)

Basing specific jurisdiction on mere similarity between a corporation's forum activities and those outside the state, as the majority does in this case, defeats the relatedness requirement's functions of reciprocity, predictability, and interstate federalism. If BMS must answer in a California court for Plavix claims arising across the country simply because some Californians have made similar claims, the link between the benefits BMS has sought by doing that business in the state and the liabilities to which it is exposed here has been severed. In the same way, predictability has been severely impaired, as the company's potential liabilities cannot be forecast from its state activities. And interstate federalism is perhaps most directly impaired; by taking jurisdiction to adjudicate a dispute arising only from BMS's actions in, for example, Texas, and allegedly resulting in injuries only to a Texan, the California courts infringe directly on Texas's sovereign prerogative to determine what liabilities BMS should bear for actions in its borders and injuring its residents. "[T]he forum state arguably exceeds its sovereignty when it asserts jurisdiction over claims that are merely similar to activities within its borders, as opposed to causally connected to the forum conduct." (Andrews, *supra*, 58 SMU L.Rev. at pp. 1354-1355.)

For decades, commentators have rejected similarity as an adequate criterion of connection or relatedness, recognizing that its excessive breadth would create jurisdiction in every state for every breach by a national corporation, wherever it occurred. "Thus the similarity test would apparently have to allow jurisdiction in any State in the country where the defendant has engaged in similar activities." (Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction* (1980) Sup.Ct.Rev. 77, 84; accord, Rhodes & Robertson, *Toward a New Equilibrium in Personal Jurisdiction* (2014) 48 U.C. Davis L.Rev. 207, 242 [allowing specific jurisdiction "in every forum in which the defendant conducts continuous and systematic forum activities that are sufficiently similar to the occurrence in dispute . . . would give the plaintiff the choice of essentially every state for proceeding against a national corporation"].) Today, the majority, by holding the presence of California plaintiffs with claims similar to those of real parties in interest constitutes a substantial connection between real parties' claims and BMS's California activities, effectively sanctions California courts taking jurisdiction over actions by plaintiffs throughout the nation alleging injuries from any nationwide business activity.

As California holds a substantial portion of the United States population, any company selling a product or service nationwide, regardless of where it is incorporated or headquartered, is likely to do a substantial part of its business in California. Under the majority's theory of specific jurisdiction, California provides a forum for plaintiffs from any

number of states to join with California plaintiffs seeking redress for injuries from virtually any course of business conduct a defendant has pursued on a nationwide basis, without any showing of a relationship between the defendant's conduct in California and the nonresident plaintiffs' claims. The majority thus sanctions our state to regularly adjudicate disputes arising purely from conduct in other states, brought by nonresidents who suffered no injury here, against companies who are not at home here but simply do business in the state.

Such an aggressive assertion of personal jurisdiction is inconsistent with the limits set by due process. Although those limits are more flexible and less strictly territorial than in the past, the high court has explained that they still act to keep any one state from encroaching on the others: "[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." (*World-Wide Volkswagen*, *supra*, 444 U.S. at p. 293.) That BMS marketed and sold Plavix throughout the United States, presumably using much of the same advertising in many markets, does not give California authority, under our federal system, to assert jurisdiction over claims arising throughout the nation. Speaking of the limits to jurisdiction set by interstate federalism, the court in *Boaz*—also involving a pharmaceutical drug marketed throughout the nation—observed: "We have no warrant to jettison these principles in favor of an approach which recognizes no defined limits to the assertion of jurisdiction against any defendant whose

national marketing somehow affects commerce in the forum state." (*Boaz*, *supra*, 40 Cal.App.4th at p. 721.)

Assessing the fairness of specific jurisdiction " 'in the context of our federal system of government' " (*World-Wide Volkswagen*, *supra*, 444 U.S. at pp. 293–294), we should be restrained here by the absence of any discernable state interest in adjudicating the nonresident plaintiffs' claims. Where the conduct sued upon did not occur in California, was not directed at individuals or entities in California, and caused no injuries in California or to California residents, neither our state's interest in regulating conduct within its borders (*Vons*, *supra*, 14 Cal.4th at p. 472) nor its interest in providing a forum for its residents to seek redress for their injuries (*id.* at p. 473) is implicated. On the critical question of why a Texan's claim he was injured in Texas by taking Plavix prescribed and sold to him in Texas should be adjudicated in California, rather than Texas (or in Delaware or New York, BMS's home states), the majority offers no persuasive answer.

## CONCLUSION

Like the majority, I conclude BMS, despite its significant business activities in California, is not at home in our state for purposes of asserting general personal jurisdiction over it. But neither, in my view, is specific jurisdiction over the nonresident plaintiffs' claims proper. No substantial connection has been shown between BMS's activities in California and the nonresidents' claims, which arose out of BMS's marketing and sales of Plavix in other states.

For this reason, I respectfully dissent.

Filed: August 29, 2016

WERDEGAR, J.

WE CONCUR:

CHIN, J.
CORRIGAN, J.

*See next page for addresses and telephone numbers for counsel who argued in Supreme Court.*

**Name of Opinion** Bristol-Myers Squibb Company v. Superior Court

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**Unpublished Opinion**
**Original Appeal**
**Original Proceeding**
**Review Granted XXX** 228 Cal.App.4th 605
**Rehearing Granted**

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**Opinion No.** S221038
**Date Filed:** August 29, 2016

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**Court:** Superior
**County:** San Francisco
**Judge:** John E. Munter

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# APPENDIX B

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THE COURT OF APPEAL FOR THE
FIRST DISTRICT, DIVISION 2
CALIFORNIA

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No. A140035

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BRISTOL-MYERS SQUIBB COMPANY

*Petitioner,*

v.

THE SUPERIOR COURT OF
SAN FRANCISCO COUNTY,

*Respondent;*

BRACY ANDERSON et al.,

*Real Parties in Interest.*

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Trial Court: Superior Court of San Francisco County, Trial Judge: Hon. John E. Munter

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Donald M. Falk, Attorney for Amicus Curiae Chamber of Commerce of the United States of America in support of Petitioner

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J. Burton LeBlanc, Andrus Anderson LLP, Lori E. Andrus, Jenny Lee Anderson, Law Offices of Collyn A. Peddie, Collyn A. Peddie, Attorneys for Amicus Curiae American Association for Justice in support of Real Parties in Interest

Robbins Geller Rudman & Dowd LLP, Kevin K. Green, Attorney for Amicus Curiae Consumer Attorneys of California in support of Real Parties in Interest

Brick, J.*

This case calls upon us to decide whether California has personal jurisdiction over a nonresident corporate defendant on unique facts. Deendant Bristol–Myers Squibb Company (BMS) has been sued by dozens of California residents in a coordinated proceeding before the San Francisco Superior Court. They allege defects in Plavix, a drug BMS manufactures and sells throughout the country. Jurisdiction over BMS as to these plaintiffs is conceded. The question presented is whether California also has jurisdiction over BMS regarding identical Plavix defects claims brought by hundreds of non-resident co-plaintiffs, the real parties in interest here (RPI), in the same coordinated proceeding, consistent with the Due Process Clause of the Fourteenth Amendment.

BMS moved below to quash service of the summons regarding the RPI's complaints for lack of personal jurisdiction. The RPI argued that California has jurisdiction over BMS, whether it be general, that is,

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* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

jurisdiction over claims unrelated to the forum state, or specific, that is, jurisdiction based upon the relationship of the RPI claims, BMS, and California. The trial court denied BMS's motion based on its conclusion that California has general jurisdiction over BMS, and did not address the issue of specific jurisdiction.

BMS filed a petition for writ of mandate in this court to reverse the trial court's ruling. We summarily denied this petition. However, on the same day that we did so, the United States Supreme Court issued *Daimler AG v. Bauman* (2014) ___ U.S. ___ [134 S.Ct. 746] (*Daimler*), which limited the application of general jurisdiction under the Fourteenth Amendment. Our own Supreme Court then granted BMS's petition for review and transferred the matter back to us for further consideration. Upon our review of the parties' further briefing and *Daimler*, we conclude California does not have general jurisdiction over BMS based upon the facts of this case.

This does not end our inquiry, however. Although the trial court did not address the issue of specific jurisdiction, we do so now because the underlying facts we rely upon are undisputed. In order to resolve this issue, we apply the time-honored test for the application of specific jurisdiction adopted by the United States Supreme Court in *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316 (*International Shoe*) and reaffirmed by it and the California Supreme Court over the past 65 years in order to determine whether such jurisdiction is consistent with the traditional conception of " 'fair play and substantial justice.' " (*Daimler*, *supra*,

134 S.Ct. at p. 754.) Having done so, we conclude that BMS has engaged in substantial, continuous economic activity in California, including the sale of more than a billion dollars of Plavix to Californians. That activity is substantially connected to the RPI's claims, which are based on the same alleged wrongs as those alleged by the California resident plaintiffs. Further, BMS does not establish it would be unreasonable to assert jurisdiction over it. Therefore, we conclude that it is consistent with due process to require BMS to defend the RPI's claims before the trial court in coordination with the claims of the California resident plaintiffs. Accordingly, we affirm the trial court's order denying the motion to quash based upon the doctrine of specific jurisdiction.

## BACKGROUND

### *Trial Court Proceedings*

On March 12, 2012, eight separate complaints, each including California residents and non-residents as plaintiffs, were filed in the San Francisco Superior Court by or on behalf of 659 individuals, consisting of 84 California residents and 575 non-residents (the RPI), who allegedly were prescribed and ingested Plavix. They (or their spouses) claim that they suffered adverse consequences as a result. Each complaint contains the same 12 causes of action.[1] The two named

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[1] Strict Products Liability; Strict Liability—Manufacturing Defect; Negligence; Breach of Implied Warranty; Breach of Express Warranty; Deceit by Concealment—Civil Code sections 1709, 1710; Negligent Misrepresentation; Fraud by Concealment; Violation of Business and Professions Code section 17200; Violation of Business and Professions Code

defendants in each of these cases are McKesson Corporation (McKesson), which is alleged to be a pharmaceutical distribution and marketing company organized under Delaware law and headquartered in San Francisco, and BMS, which is alleged to be a pharmaceutical manufacturing and marketing company that makes and markets Plavix throughout the United States, organized under Delaware law and headquartered in New York.

Each of the complaints alleges in identical terms that defendants introduced Plavix in 1997 and heavily marketed it directly to consumers by falsely representing it "as providing greater cardiovascular benefits, while being safer and easier on a person's stomach than aspirin." According to the complaints, defendants knew that those claims were untrue and that ingesting Plavix involved "the risk of suffering a heart attack, stroke, internal bleeding, blood disorder or death [which] far outweighs any potential benefit."

On April 11, 2012, prior to being served with seven of these eight cases, BMS removed them to federal court. They were all remanded on August 10, 2012.

On September 27, 2012, BMS filed motions to quash service of the summons regarding the complaints, but not with respect to the California resident plaintiffs.[2] The plaintiffs began discovery

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section 17500; Violation of Civil Code section 1750; Loss of Consortium.

[2] BMS's petition acknowledges that the facts developed in the trial court with respect to BMS's California contacts "may be sufficient to vest *specific* personal jurisdiction over BMS" as to the 84 resident plaintiffs' claims. In subsequent briefing and

regarding these motions.[3] Meanwhile, pursuant to Code of Civil Procedure section 404.3 and rule 3.540 of the California Rules of Court,[4] Chief Justice Cantil-Sakauye, as Chair of the Judicial Council, authorized the presiding judge of the superior court to assign the eight San Francisco cases, with another, to a coordination trial judge, which the presiding judge did on April 25, 2013.

BMS was permitted to refile a consolidated motion to quash with respect to the RPI, which it did on July 9, 2013. In this motion, BMS noted in passing that "[the RPI] cannot invoke specific jurisdiction here because it is limited to cases where the 'controversy is related to or arises out of [the] defendant's contacts with the forum,' " citing *DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1089. Its principal argument, however, was that, under the recent decision of the United States Supreme Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) ___ U.S. ___ [131 S.Ct. 2846] (*Goodyear*), the trial court could not assert general jurisdiction over BMS unless BMS were "at home" in California. According to BMS, its California contacts did not rise

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oral argument, BMS has conceded that California has jurisdiction over it with respect to their claims.

[3] The petition tells us that "[a]nother 40 actions involving 2,363 plaintiffs have been filed in San Francisco Superior Court." At oral argument, counsel for BMS advised us that if the multi-district litigation (MDL) cases are remanded to the San Francisco Superior Court, there will be 251 California resident plaintiffs and 3,519 non-California resident plaintiffs. Counsel for the RPI did not take issue with those numbers. Those MDL cases and plaintiffs are not presently before us.

[4] Unless otherwise noted, further statutory references are to the Code of Civil Procedure.

to that level since it was neither headquartered nor incorporated here. BMS also argued, relying on factors that apply in a specific jurisdiction inquiry, that it would violate principles of fair play and substantial justice to require that it defend against the RPI's claims here.

The RPI responded that BMS's extensive contacts with California supported the assertion of general jurisdiction under leading cases such as *Buckeye Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893, 898-899. They pointed out the factual differences between the present case and Goodyear and argued that Goodyear did not disturb precedent that warranted an exercise of personal jurisdiction here. They also argued that specific jurisdiction is appropriate when a defendant has purposefully directed its activities at residents of the forum and the litigation results from alleged injuries that "arise out of or relate to" those activities, citing *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472 (*Burger King*) and *Helicopteros Nacionales de Columbia, S.A. v. Hall* (1984) 466 U.S. 408, 414 (*Helicopteros*), and that the multi-factor "reasonableness" test set out in *Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102 (*Asahi*)[5] weighed in favor of finding specific jurisdiction over BMS as to the claims of the RPI here.

BMS reargued the importance of Goodyear in its reply. It also cited *Spirits, Inc. v. Superior Court* (1980) 104 Cal.App.3d 918, 926 for the proposition that specific jurisdiction cannot be asserted "where

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[5] We discuss this test in more detail in section II.D., *post*.

neither the injury nor the conduct that led to it have a substantial relationship to California."

On September 23, 2013, the trial court heard argument on BMS's motion to quash, the matter was submitted, and the court denied the motion. In a subsequent written order, the court, relying heavily on *International Shoe*, *supra*, 326 U.S. 310, and *Hesse v. Best Western International, Inc.* (1995) 32 Cal.App.4th 404, concluded that a defendant's wide-ranging, systematic, and continuous contacts with a forum state justify the exercise of general jurisdiction over it. The court held that California had general jurisdiction over BMS because it had sold in the state nearly $1 billion worth of Plavix between 2006 and 2012 and 196 million Plavix pills between 1998 and 2006, had been registered with the California Secretary of State to conduct business since 1936, maintained an agent for service of process in Los Angeles, operated five offices in California that employed approximately 164 people, employed approximately 250 in-state sales representatives, owned a facility in Milpitas employing 85 people that was used primarily for research, operated other facilities that were used primarily for research and laboratory activities in Aliso Viejo, San Diego and Sunnyvale, and had a small office in Sacramento that was used by the company's Government Affairs group.

The court did not directly address the question of whether, as the RPI argued in the alternative, BMS is amenable to suit in California under the doctrine of specific jurisdiction. However, as we will see, the court's references to BMS's extensive activities in California, its enjoyment of the benefits and

protections of its laws, and the exercise of jurisdiction comporting with ' " traditional notions of fair play and substantial justice " ' (*International Shoe, supra*, 326 U.S. at p. 316) are entirely consistent with a finding that specific jurisdiction is appropriate.

***The Present Writ Proceedings***

BMS filed the pending writ petition on October 22, 2013. After review of the RPI's verified preliminary opposition and BMS's reply, we summarily denied the petition on January 14, 2014—the same day that the United States Supreme Court announced its decision in *Daimler*. BMS promptly sought review in the California Supreme Court, relying principally upon *Daimler* and *Goodyear*.

On February 26, 2014, the court granted that petition and transferred the matter back to us with directions to vacate our prior order and issue an order to show cause why the relief sought should not be granted. We did so on March 13, 2014. The RPI filed their verified opposition, but not a formal return, on March 28, 2014. BMS filed its traverse on April 14, 2014, in which it points out that no formal return including a verified answer was filed. It argues that the opposition was not effective to deny the factual allegations of the petition, citing, among others, Eisenberg et al., California Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) paragraph 15:223 at page 15-96.14. However, BMS's legal conclusions have not been admitted. And, to the extent that the facts were effectively denied in the RPI's verified preliminary opposition and

opposition, we exercise our discretion to treat those facts as denied.[6]

We granted leave for the Chamber of Commerce of the United States of America to file an amicus curiae brief in support of BMS's petition. The RPI did not respond, but the Consumer Attorneys of California and the American Association for Justice subsequently filed unopposed applications for leave to file amicus briefs in support of the RPI, which we also granted. BMS filed a response to those amicus briefs on June 9, 2014. Prior to oral argument, we asked the parties to focus their presentations on certain questions related to whether or not the lower court could exercise specific jurisdiction over BMS under the unique circumstances of this case. The parties did so at oral argument, which took place on June 17, 2014, and the matter was submitted.

## DISCUSSION

### I. *General Jurisdiction*

BMS argues that *Daimler* makes clear the trial court erred in concluding it had general jurisdiction over BMS. We agree.

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[6] An example of a mixed question of law and fact appears at paragraph 19 of the petition, where BMS alleges that "Petitioner will suffer irreparable injury and be denied due process if it is forced to defend in California courts hundreds of claims brought by out-of-state plaintiffs who have no connection to this State and whose injuries did not occur here." RPI's informal verified response includes the statement that "BMS cannot demonstrate that it will suffer irreparable harm and be denied due process if its Petition were denied and it were 'forced' to defend the nonresident Plaintiffs' cases in California." We will treat BMS's entire allegation as being denied.

## A. *The Origins of the Modern Jurisprudence Regarding Personal Jurisdiction*

We begin our analysis of personal jurisdiction with a review of the two seminal cases for our modern jurisprudence on the subject, *Pennoyer v. Neff* (1878) 95 U.S. 714 (*Pennoyer*) and *International Shoe*.[7]

In *Pennoyer*, *supra*, 95 U.S. 714, the Supreme Court articulated a strictly territorial rule for what personal jurisdiction a state court could assert over a non-resident consistent with the Fourteenth Amendment. Neff, a California resident, owned a tract of land in Oregon. Mitchell, an Oregon resident, sued Neff in an Oregon state court for money owed for legal services rendered. After service of the suit by publication and mailing to Neff was made as required by Oregon law, judgment by default was entered against Neff. Pursuant to an execution issued upon this judgment, Pennoyer acquired the tract under a sheriff's deed. Neff then sued Pennoyer in federal court to recover the tract. (*Pennoyer*, *supra*, 95 U.S. at pp. 719-720.)

The *Pennoyer* court determined the judgment against Neff was void because a state could not, consistent with constitutional due process, acquire jurisdiction by the service methods used against a non-resident who is absent from the state. The court stated, "The authority of every tribunal is necessarily restricted by the territorial limits of the State in

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[7] Pursuant to section 410.10, California's "long-arm" statute (*Integral Development Corp. v. Weissenbach* (2002) 99 Cal.App.4th 576, 583), " ' [a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.' "

which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse." (*Pennoyer*, *supra*, 95 U.S. at p. 720.) In other words, "no State can exercise direct jurisdiction and authority over persons or property without its territory." (*Id.* at p. 722.)

Sixty-seven years later, the Supreme Court replaced this strict territorial rule with a more flexible one in *International Shoe*. International Shoe Company was a Delaware corporation headquartered in Missouri (International Shoe). It challenged the right of the State of Washington to collect from it contributions to Washington's state unemployment compensation fund based on International Shoe's commissions to 11 to 13 salesmen living and working in Washington. International Shoe had no office in Washington (although its salesmen rented temporary and permanent sample rooms and were reimbursed by the company) and did not maintain any stock of merchandise there; its deliveries of merchandise sold by its salesmen were all made in interstate commerce. (*International Shoe*, *supra*, 326 U.S. at pp. 313-314.)

The Supreme Court reviewed the principles of personal jurisdiction at some length and rejected International Shoe's argument that personal jurisdiction over it in Washington would violate due process. Its opinion predated the court's later distinctions between "general jurisdiction" and

"specific jurisdiction,"[8] and it contains analysis that is relevant to both. In what has become the foundation of personal jurisdiction, the court stated, "While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, [citations], there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." (*International Shoe*, *supra*, 326 U.S. at p. 318.) The court continued, "although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, [citation], other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." (*Ibid.*)

The court concluded, "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be

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[8] That distinction was suggested by Professors von Mehren and Trautman in 1966. (See von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis* (1966) 79 Harv. L.Rev. 1121, 1136.) The terminology, and the differentiation between "general or all purpose" jurisdiction and "specific or case linked" jurisdiction, were first discussed by the Supreme Court in *Helicopteros*, *supra*, 466 U.S. at pages 414, footnote 8 and 415, footnote 9.

simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. [Citations.] Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." (*International Shoe*, *supra*, 326 U.S. at p. 319.)

As Justice Ginsburg recently noted in *Daimler*, *supra*, 134 S.Ct. at page 754, the *International Shoe* court ultimately found that Washington had personal jurisdiction over International Shoe based on what would later become known as "specific jurisdiction": "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, *so far as those obligations arise out of or are connected with the activities within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (*International Shoe*, *supra*, 326 U.S. at p. 319, italics added.)

The court found that International Shoe's activities were "systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It

is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there." (*International Shoe*, *supra*, 326 U.S. at p. 320.)

Since *International Shoe* and before *Daimler*, courts determining whether general jurisdiction existed often focused on the quality and quantity of contacts a company had with a particular state, without much additional analysis or inquiry. This appears to be the approach taken by the RPI and court below. However, as we now discuss, *Goodyear* and *Daimler* together make clear that general jurisdiction should be asserted only when the evidence indicates the company is " ' "essentially at home" ' " in the state. (*Daimler*, *supra*, 134 S.Ct. at p. 751.)

**B. *Goodyear***

The Supreme Court first referred to this "at home" standard in *Goodyear*. Two young soccer players from North Carolina were killed in a bus accident outside Paris, France. Their parents filed wrongful-death suits in the state courts of North Carolina against three foreign Goodyear entities, which were located in Luxembourg, Turkey, and France respectively (together petitioners). They all were indirect subsidiaries of Goodyear USA, an Ohio corporation also named as a defendant. The facts showed that the petitioners "[had] no place of business, employees, or bank accounts in North Carolina. They [did] not design, manufacture, or advertise their products in North Carolina. And they

[did] not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers. Even so, a small percentage of petitioners' tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates. These tires were typically customer ordered to equip specialized vehicles ... and ... the type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina." (*Goodyear*, *supra*, 131 S.Ct. at p. 2852.)

The petitioners (but not Goodyear USA) moved to dismiss the claims against them for lack of personal jurisdiction. The trial court denied their motion and the North Carolina Court of Appeals affirmed. The Supreme Court reversed in a unanimous decision written by Justice Ginsburg. It rejected the view of the North Carolina courts that North Carolina had general jurisdiction over the petitioners consistent with the Due Process Clause of the Fourteenth Amendment because some of their tires, although manufactured abroad, had reached North Carolina through the "'the stream of commerce.'" "A connection so limited between the forum and the foreign corporation ... is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the 'continuous and systematic' affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State." (*Goodyear*, *supra*, 131 S.Ct. at p. 2851.)

The *Goodyear* court could have ended its analysis there, but it did not. Quoting *International Shoe*, it

described "general" jurisdiction as " 'instances in which continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.' " (*Goodyear*, *supra*, 131 S.Ct. at p. 2853, quoting *International Shoe*, *supra*, 326 U.S. at p. 318.) It continued, "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." (*Goodyear* at pp. 2853-2854.) The court favorably cited a 23–year old Texas Law Review article by Professor Lea Brilmayer as "identifying domicile, place of incorporation, and principal place of business as 'paradig[m]' bases for the exercise of general jurisdiction." (*Goodyear* at p. 2854, citing Brilmayer, *A General Look At General Jurisdiction* (1988) 66 Texas L.Rev. 721, 728.)

BMS relies here, as it did in the trial court, upon the *Goodyear* court's use of the phrase "at home" as setting the minimum standard under which general jurisdiction can be asserted against an out of state corporate defendant. But that phrase was not explained in the court's *Goodyear* decision beyond the reference to Professor Brilmayer's law review article. To the contrary, the *Goodyear* court, after discussing the only two general jurisdiction cases decided by the court after *International Shoe*, *Perkins v. Benquet Consolidated Mining Co.* (1952) 342 U.S. 437 (*Perkins*) and *Helicopteros*, *supra*, 466 U.S. 408, concluded, "petitioners are in no sense at

home in North Carolina. [9] Their attenuated connections to the State ... fall far short of ... 'the continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." (*Goodyear*, *supra.* 131 S.Ct at p. 2857, quoting *Helicopteros*, *supra*, 466 U.S. at p. 416.)

Thus, while the court's decision in *Daimler* has proven BMS to be correct about the significance of these passing references to "at home" in *Goodyear*, a further contouring of the law of general jurisdiction was by no means obvious from the *Goodyear* decision. This was especially true in light of the *Goodyear* court's observation that "[t]he canonical opinion in this area remains" *International Shoe* (*Goodyear*, *supra*, 131 S.Ct. at p. 2853) and its own quoting of the traditional standard for general jurisdiction:

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[9] Justice Ginsburg also used the phrase "at home" in her dissenting opinion in *J. McIntyre Machinery, Ltd. v. Nicastro* (2011) ___ U.S. ___ [131 S.Ct. 2780] (*J.McIntyre* ), which was announced on the same day as *Goodyear*. *J. McIntyre* involved injury to a New Jersey resident in New Jersey from use of a machine made by a British company with no direct connections to that state, but which marketed machines extensively in the United States through a distributor. Justice Ginsburg parted ways from the four justices in the plurality opinion to express her view that marketing with the expectation of sales throughout the United States could be sufficient to support specific jurisdiction over an injury claim arising in New Jersey. She agreed, however, citing *Goodyear*, that the company was not subject to general jurisdiction in New Jersey courts because it was "hardly 'at home' in New Jersey," but once more provided no further explanation for what it meant to be "at home" for jurisdictional purposes. (*Id.* at p. 2797 [dis. opn. of Ginsburg, J.].)

" 'the continuous and systematic general business contacts necessary to empower [the forum state] to entertain suit against them on claims unrelated to anything that connects them to the State.' " (*Id.* at p. 2857, quoting *Helicopteros*, *supra*, 466 U.S. at p. 416.)[10]

## C. *Daimler*

The Supreme Court further explained its "at home" standard in *Daimler*. Argentinean residents with no connection to California sued Daimler AG, alleging that its wholly-owned Argentinean subsidiary collaborated with state security forces to kidnap, detain, torture, and kill plaintiffs or their relatives in Argentina during Argentina's " 'Dirty War' " between 1976 and 1983. They filed suit in the Northern District of California based upon a theory of general jurisdiction. Daimler AG had no contact with California, but another of its wholly owned subsidiaries, Mercedes–Benz USA, LLC (MBUSA), did extensive business in California, although it was incorporated in Delaware and had its principal place of business in New Jersey. The district court granted Daimler's motion to dismiss for lack of personal jurisdiction, but the Ninth Circuit reversed. (*Daimler*, *supra*, 134 S.Ct. at pp. 751-753.)

The Supreme Court granted certiorari and reversed. It noted that the plaintiffs' theory of general jurisdiction included that, "if a Daimler-

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[10] Because of our conclusion that *Daimler* forecloses the RPI's general jurisdiction argument, we need not discuss the very different facts before the Supreme Court in *Perkins*, in which general jurisdiction was upheld, and *Helicopteros*, in which it was not. Neither case applied the doctrine of specific jurisdiction, which we take up, *post*.

manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California." (*Daimler*, *supra*, 134 S.Ct. at p. 751.) It held that "[e]xercises of personal jurisdiction so exorbitant ... are barred by due process constraints on the assertion of adjudicatory authority." (*Ibid.*) It repeated its holding in *Goodyear* that a court may assert general jurisdiction "over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive '*as to render [it] essentially at home in the forum State.*'" (*Daimler* at p. 751, italics added.) "Instructed by *Goodyear*," the court concluded that "Daimler [was] not 'at home' in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in Argentina." (*Ibid.*)

Importantly for our case, the *Daimler* court also held that Daimler's connections to California through MBUSA were insufficient to support general jurisdiction. MBUSA, an indirect subsidiary of Daimler, served as Daimler's exclusive importer and distributor in the United States, "purchasing Mercedes–Benz automobiles from Daimler in Germany, then importing those vehicles, and ultimately distributing them to independent dealerships located throughout the Nation. Although MBUSA's principal place of business is in New Jersey, MBUSA ha[d] multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine . . . . MBUSA [was] the largest supplier of luxury vehicles to the California market.

In particular, over 10% of all sales of new vehicles in the United States [took] place in California, and MBUSA's California sales account[ed] for 2.4% of Daimler's worldwide sales." (*Daimler*, *supra*, 134 S.Ct. at p. 752.) Nonetheless, the court concluded, "[e]ven if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there." (*Id.* at p. 760.)

The *Daimler* court further explained, "*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. 'For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.' [Citations.] With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.' [Citation.] Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. [Citation.] These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." (*Daimler*, *supra*, 134 S.Ct. at p. 760.) The court "[did] not foreclose the possibility that ... a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State[,]"

but stated this was "an exceptional case." (*Id.* at p. 761, fn. 19.)

"*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.' [Citation.] That formulation, we hold, is unacceptably grasping.

"... [T]he words 'continuous and systematic' were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate. [Citation.] Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of 'instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit ... *on causes of action arising from dealings entirely distinct from those activities.*' [Citations.] Accordingly, the inquiry under Goodyear is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.' " (*Daimler, supra*, 134 S.Ct. at p. at pp.760-761.) The court further distinguished between general and specific jurisdiction by noting that they "have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from

*Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized. As this Court has increasingly trained on the 'relationship among the defendant, the forum, and the litigation,' [citation], *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme." (*Daimler, supra,* 134 S.Ct. at pp. 757-758.)

The court further clarified that "general jurisdiction inquiry does not 'focu[s] solely on the magnitude of the defendant's in-state contacts.' [Citation.] General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." (*Daimler, supra,* 134 S.Ct. at p. 762, fn. 20.)

### D. *Application of Goodyear and Daimler to This Case*

We recognize that the trial court's determination that it has general jurisdiction was based on a record created and an analysis engaged in prior to Daimler. As a result, the RPI, who have the burden of proving jurisdiction here (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062 (*Snowney*); *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449 (*Vons*)), may not have pursued certain discovery and did not present certain facts and arguments that are relevant post-*Daimler* to determining whether general jurisdiction exists.

Specifically, the RPI focused on BMS's significant contacts with California. They did not establish that BMS is incorporated, has its principal place of business, or has its headquarters here. Further, the RPI did not present much, if any, evidence regarding BMS's activities in their entirety and, therefore, did not establish that BMS's contacts with California were somehow so exceptional as to render BMS "essentially at home" here. Based on the record before us, we cannot effectively distinguish BMS's extensive sales and research activities in California from the extensive sales activities of MBUSA in California as discussed in *Daimler*, which the Supreme Court ruled were insufficient to establish the State had general jurisdiction over Daimler. Therefore, the trial court's ruling that it had general jurisdiction over BMS cannot be allowed to stand.

## II. *Specific Jurisdiction*

As Division Four of this court has noted, "we do not review the reasons why the trial court ruled as it did, but consider the validity of its ruling. If a trial court's ruling is correct, we will affirm, even if its reasoning was flawed." (*In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 117.) Although the parties debated specific jurisdiction below, the trial court, without the benefit of Daimler, did not find it necessary to address that issue. The parties again debate the issue in this appeal. We decide the issue now because there is no dispute as to the jurisdictional facts.[11] In such a circumstance,

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[11] At oral argument, the RPI's counsel suggested that if we were inclined to rule against the RPI on the issue of specific jurisdiction, we should remand so that a more complete record of McKesson's role with respect to the RPI could be developed.

" ' "the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record." ' " (*Snowney*, *supra*, 35 Cal.4th at p. 1062, quoting Vons, supra, 14 Cal.4th at p. 449.) Upon conducting such an independent review, we conclude the trial court has specific jurisdiction over BMS.

The Supreme Court's discussion in *Daimler* indicates that specific jurisdiction continues to "flourish" as it has for many years.[12] Whether or not a court has specific jurisdiction over a defendant involves an analysis of whether, first, the defendant has " 'purposefully directed' " its activities at the forum state (*Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 774 (*Keeton*); second, the plaintiff's claims are related to or arise out of these forum-directed activities (*Helicopteros*, *supra*, 466 U.S. at p. 414); and, third, the exercise of jurisdiction is

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BMS's counsel opposed that suggestion, stating that the RPI had a full and fair opportunity to take discovery in opposition to the motion to quash. We note that the record provided to us does not show that the RPI sought to continue the hearing on the consolidated motion to quash because of any claim of inadequate opportunity for discovery. Be that as it may, for the reasons discussed, *post*, we find the undisputed facts before us sufficient to support specific jurisdiction over BMS.

[12] Justice Ginsburg, responding on behalf of the *Daimler* majority to Justice Sotomayor's concern, stated in a concurring opinion, that narrowing the doctrine of general jurisdiction would result in injustices, wrote: "Remarkably, Justice Sotomayor treats specific jurisdiction as though it were barely there. Given the many decades in which specific jurisdiction has flourished, it would be hard to conjure up an example of the 'deep injustice' Justice Sotomayor predicts as a consequence of our holding that California is not an all-purpose forum for suits against Daimler." (*Daimler*, *supra*, 134 S.Ct. at p. 758, fn. 10.)

reasonable. (*Asahi*, *supra*, 480 U.S. at p. 113.) That said, as our own Supreme Court has noted, "the United States Supreme Court has rejected the use of 'talismanic jurisdictional formulas' (*Burger King*, *supra*, 471 U.S. at p. 485), stating that ' "the facts of each case must [always] be weighed" in determining whether personal jurisdiction would comport with "fair play and substantial justice." ' "(*Vons*, *supra*, 14 Cal.4th at p. 460.) We now discuss each of these matters.

### A. *The Traditional Conception of "Fair Play and Substantial Justice"*

In *Daimler*, the Supreme Court noted: "*International Shoe*'s conception of 'fair play and substantial justice' presaged the development of two categories of personal jurisdiction. The first category is represented by *International Shoe* itself, a case in which the in-state activities of the corporate defendant 'ha[d] not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on.'.... Adjudicatory authority of this order, in which the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum,' [citation] is today called 'specific jurisdiction.' " (*Daimler*, *supra*, 134 S.Ct. at p. 754, citing *Goodyear*, *supra*, 131 S.Ct. 2853.)

As suggested by Justice Sotomayor's concurrence in *Daimler* and the majority's response, this concept, referred to by Justice Sotomayor as "reciprocal fairness," is a " 'touchstone principle of due process' "regarding specific jurisdiction. (*Daimler*, *supra*, 134 S.Ct. at p. 758, fn. 10; *Id.* at p. 768 [conc. opn. of Sotomayor, J.].) It dates back to *International Shoe*, in which the Supreme Court held, "to the extent that a corporation exercises the privilege of conducting

activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (*International Shoe*, *supra*, 326 U.S. at p. 319.) In other words, in analyzing the exercise of specific jurisdiction, "[o]nce it has been decided that a defendant purposely established minimum contacts with the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" (*Burger King*, *supra*, 471 U.S. at p. 476.)

**B. *"Minimum Contacts" and "Relatedness"***

Several more recent Supreme Court cases have reaffirmed this fundamental tenet of personal jurisdiction in discussing the minimum contacts between a defendant and a forum state, and the relatedness of these contacts to a plaintiff's claims, that are necessary to establish specific jurisdiction. For example, in *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286 (*World-Wide Volkswagen*), defendant, a New York automobile wholesaler and retailer with no contact with Oklahoma, was sued in Oklahoma by New York residents who were passing through that state when they had a car accident. The Supreme Court held that the accident's location was not a sufficient basis for an Oklahoma court's assertion of personal jurisdiction over the defendant. In so holding, the

court reiterated the rule of *International Shoe*: "As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. [*International Shoe*, *supra*, at p. 316]. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. [¶] The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.' We have said that the defendant's contacts with the forum State must be such that maintenance of the suit 'does not offend "traditional notions of fair play and substantial justice." '[*International Shoe*, *supra*, at p. 316.]" (*World–Wide Volkswagen*, *supra*, 444 U.S. at pp. 291-292.)

That said, the *World-Wide Volkswagen* court also noted that "[t]he limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years" because of "a fundamental transformation in the American economy." (*World-Wide Volkswagen*, *supra*, 444 U.S. at pp. 292-293.) It quoted its view some years before in *McGee v. International Life Ins. Co.* (1957) 355 U.S. 220 (*McGee*) that there was an increasing nationalization of commerce and amount of business conducted by mail across state lines, and that " 'at

the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.' " (*World-Wide Volkswagen*, at p. 293, quoting *McGee*, at pp. 222-223.) These historical developments, the court further noted, "have only accelerated in the generation since" *McGee* was decided. (*World-Wide Volkswagen*, at p. 293.)

In a case decided a few years after *World-Wide Volkswagen*, *Keeton*, *supra*, 465 U.S. 770, the Supreme Court, again guided by the traditional conception of fair play and substantial justice, found specific jurisdiction existed, even though neither the plaintiff nor the defendant resided in the forum State and most of the plaintiff's injuries occurred elsewhere. In *Keeton*, the United States Court of Appeals for the First Circuit had upheld a district court's dismissal of plaintiff's libel suit against Hustler Magazine for lack of personal jurisdiction because New Hampshire's "interest in redressing the tort of libel to petitioner [was] too attenuated for an assertion of personal jurisdiction over respondent." (*Keeton*, *supra*, 465 U.S. at p. 773.) The First Circuit also had held that it would have been unfair to apply New Hampshire's uniquely long six-year statute of limitations for libel damages accruing throughout the United States under the " 'single publication rule.' " (*Ibid.*)

The Supreme Court reversed. It held that Hustler Magazine, having "continuously and deliberately exploited the New Hampshire market, ... must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine,"

even if New Hampshire applied the single publication rule to allow recovery of damages from publications throughout the United States that otherwise would have been time-barred. (*Keeton, supra*, 465 U.S. at pp. 781, 774-775.) The court repeated its previous instruction that, "[i]n judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.' [Citations.] Thus, it is certainly relevant to the jurisdictional inquiry that petitioner is *seeking* to recover damages suffered in all States in this one suit. The contacts between respondent and the forum must be judged in the light of that claim, rather than a claim only for damages sustained in New Hampshire. That is, the contacts between respondent and New Hampshire must be such that it is 'fair' to compel respondent to defend a multistate lawsuit in New Hampshire seeking nationwide damages for all copies of the five issues in question, even though only a small portion of those copies were distributed in New Hampshire." (*Id.*, at p. 775.)

*Keeton* further instructs that the doctrine of specific jurisdiction can apply to the claims of a non-resident against a non-resident. Initially, we acknowledge, as does *Keeton*, that the clearest case for specific jurisdiction exists when the nonresident defendant's conduct has caused injury to plaintiff in his or her state of residence, and plaintiff sues there. That has been understood since *International Shoe, supra*, 326 U.S. at page 317 (" '[p]resence' in the state ... has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or

authorization to an agent to accept service of process has been given"). However, even though most cases in which specific jurisdiction has been upheld involved a resident plaintiff, the Supreme Court has *not* held that due process *requires* that to be so.

To the contrary, in addition to reiterating the longstanding rule that "in judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation' " (*Keeton*, *supra*, 465 U.S. at p. 775), *Keeton* makes clear that "[p]laintiff's residence may be the focus of the activities of the defendant out of which the suit arises. [Citations.] But plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." (*Id.* at p. 780; accord, *Walden v. Fiore* (2014) ___ U.S. ___ [134 S.Ct. 1115, 1122-1123] (*Walden*)). As the Supreme Court stated in its latest reiteration of the minimum contacts necessary to establish specific jurisdiction, "[d]ue process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." (*Walden* at pp. 1122-1123, quoting *Burger King*, *supra*, 471 U.S. at p. 475.)

Although the doctrine of specific jurisdiction continues to flourish, its application has proved to be problematic for the Supreme Court. For example, on the same day that it decided *Goodyear*, the court issued *J. McIntyre*, *supra*, 131 S.Ct. 2780. As we have discussed, the court held that New Jersey did not have specific jurisdiction over the British

manufacturer of a machine that caused an injury to plaintiff in New Jersey. The manufacturer marketed machines in the United States, but not New Jersey, through a domestic distributor. Justice Kennedy wrote for the plurality, consisting also of Chief Justice Roberts and Justices Scalia and Thomas, with whom Justices Breyer and Alito concurred and Justices Ginsburg, Sotomayor, and Kagan dissented. Justice Kennedy, acknowledging that the doctrine of specific jurisdiction remains fully viable, wrote that "submission through contact with and activity directed at a sovereign may justify specific jurisdiction 'in a suit arising out of or related to the defendant's contacts with the forum.'" (*Id.* at pp. 2787-2788.) However, he also acknowledged that "[t]he rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in [*Asahi*, *supra*, 480 U.S. 102]." (*Id.* at p. 2785.)[13]

Furthermore, the Supreme Court has not yet further defined the second step of specific jurisdiction analysis, that being what it means for a suit to "arise

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[13] Justices Breyer and Alito concurred in the judgment only because the case did not involve recent changes in commerce and communication and they saw no need to decide the question as the plurality had. The dissenting justices indicated that, given the defendant's extensive contacts with other parts of the United States, they would have upheld the application of specific jurisdiction by the New Jersey Supreme Court on the basis that it was "fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury." (J. *McIntyre*, *supra*, 131 S.Ct. at p. 2800 [dis. opn. of Ginsburg, J.].)

out of" or "relate" to a defendant's contacts with the State. (See *Helicopteros*, *supra*, 466 U.S. at p. 416, fn. 10.) However, California's Supreme Court has provided further guidance on the "relatedness" part of the specific jurisdiction analysis. We turn now to the key cases in which it has done so.

In *Vons*, *supra*, 14 Cal.4th 434, our Supreme Court upheld California's specific jurisdiction over two Jack-in-the-Box franchisees located in the State of Washington. Extensive litigation was pending in the San Diego County Superior Court arising from E. coli exposures to Jack-in-the-Box customers around the country. Vons supplied hamburger from a California plant to Foodmaker, Inc., a Delaware corporation with its principal place of business in San Diego, of which Jack-in-the-Box was a division. Foodmaker supplied many items, including hamburger, to its Jack-in-the Box franchisees throughout the United States. Eighty-five franchisees from California and other states, whose customers had not been injured, sued Vons and Foodmaker in San Diego for loss of business caused by news of the E. coli outbreak. (*Vons*, *supra*, 14 Cal.4th at pp. 440-441.)

When Foodmaker cross-claimed against Vons in San Diego, Vons filed a cross complaint against, among others, two Washington corporations who were Jack-in-the-Box franchisees, Seabest Foods, Inc. and Washington Restaurant Management, Inc. The two owned restaurants at which customers were allegedly served contaminated burgers that caused injuries to customers. Vons alleged that the outbreak would not have occurred but for their negligence in handling the meat. It alleged causes of action for negligence, negligent and intentional

interference with economic advantage, and indemnity against them. (*Vons*, *supra*, 14 Cal.4th at pp. 441-442.)

The appeal focused on the motions by the two Washington franchisees to quash service of the summons regarding Vons's cross complaint for lack of personal jurisdiction, which were granted and affirmed on appeal. Our Supreme Court reversed, in significant part because both franchisees had consented to jurisdiction over them in disputes with Foodmaker (but not Vons) in California. In addition, both had other contacts in California. In doing so, the court extensively reviewed pertinent California and federal cases and summarized the test for specific jurisdiction as follows: " 'The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action *arises out of or has a substantial connection with that activity*, and the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction.' " (*Vons*, *supra*, 14 Cal.4th at pp. 452-453, quoting *Cornelison v. Chaney* (1976) 16 Cal.3d 143, 148 (*Cornelison*).)

The court adopted this "substantial connection" test after a careful analysis, including of *International Shoe*. (E.g., *Vons*, *supra*, 14 Cal.4th at p. 474 [quoting *International Shoe*'s statement that an undue burden would not be imposed if a defendant were required to respond to suits regarding obligations that "arise out of *or are connected with* the activities within the state" (*International Shoe*, *supra*, 326 U.S. at p. 319, italics added]). It noted that the United States Supreme Court had not

articulated a precise test for evaluating the "relatedness" requirement.

After analyzing the language in which the high court described the doctrine, the *Vons* court considered and rejected several tests proffered by the parties. (*Vons*, *supra*, 14 Cal.4th at pp. 453-455.) It held that the so-called proximate cause test, is too narrow, the " 'but for' " test is too broad and amorphous, and the "substantive relevance test" has an "overly restrictive view of the interest of the state in providing a judicial forum and redress to its residents." (*Id.* at p. 475.)[14] Instead, the *Vons* court adopted the "substantial connection" test, under which the relatedness requirement is satisfied if "there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim." (*Id.* at p. 456.)[15]

Three aspects of *Vons* are of particular note to the present case. First, the *Vons* court concluded that a defendant's contacts with the state and their connection to the claim at-issue were "inversely related." It stated, "as the high court suggested in *International Shoe*, *supra*, 326 U.S. 310, for the purpose of establishing jurisdiction the intensity of forum contacts and the connection of the claim to those contacts are inversely related. (See

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[14] We will return to the state's interest in providing a forum in our discussion of the "reasonableness" factors, *post*.

[15] Among the precedents the *Vons* court relied upon for the "substantial connection" test of relatedness was its earlier decision in *Cornelison*, *supra* 16 Cal.3d at page 148, *McGee*, *supra*, 355 U.S. at page 223, and *Hanson v. Denckla* (1958) 357 U.S. 235, 250-253, all of which discuss the significance of such a connection. (*Vons*, *supra*, 14 Cal.4th at pp. 448, 452.)

*International Shoe*, *supra*, 326 U.S. at p. 317 [' "Presence" in the state ... has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on.... Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities ... are not enough to subject it to suit on causes of action unconnected with the activities there.'].)" (*Vons*, *supra*, 14 Cal.4th at p. 452.) Quoting *Cornelison*, the *Vons* court stated, " '[A]s the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend.' " (*Vons*, *supra*, 14 Cal.4th at p. 448, quoting *Cornelison*, *supra*, 16 Cal.3d at pp. 147-148, fn. omitted.)

Second, the *Vons* court criticized the appellate court for treating the lack of relationships between Vons and the franchisees as "critical in determining whether the claim was sufficiently related to the forum contacts to permit the exercise of specific jurisdiction in California. Contrary to the Court of Appeal's thesis, ... the defendant's forum activities need not be directed at the plaintiff in order to give rise to specific jurisdiction." (*Vons*, *supra*, 14 Cal.4th at p. 457, citing *Keeton*, *supra*, 465 U.S. 770, 775; *Cornelison supra*, 16 Cal.3d 143 ["jurisdiction found although the defendant's business activities in California were not directed at the accident victim"]; *Akro Corp. v. Luker* (Fed.Cir.1995) 45 F.3d 1541. 1547 [" 'plaintiff need not be the forum resident

toward whom any, much less all, of the defendant's relevant activities were purposefully directed' "]; *In re Oil Spill by Amoco Cadiz off the Coast of France on March 16, 1978* (1983) 699 F.2d 909, 917 ["French victims of oil spill may bring a tort action against a Spanish shipbuilder in an Illinois court; their claim 'could readily be said to arise from the negotiating and signing, in Illinois, of the [shipbuilding] contract' even though the negotiations obviously were not directed at the plaintiffs."].) "The United States Supreme Court has stated more than once that *the nexus required to establish specific jurisdiction is between the defendant, the forum, and the litigation* (*Helicopteros*, *supra*, 466 U.S. at p. 411; [citation])....For the purpose of deciding whether a defendant has minimum contacts or purposefully has availed itself of forum benefits, the relevant contacts are said to be with the forum, because it is the defendant's choice to take advantage of opportunities that exist in the forum that subjects it to jurisdiction. ([*Asahi*, *supra*, 480 U.S. at p. 112; *Burger King*, *supra*, 471 U.S. at pp. 475, 479; *Helicopteros*, *supra*, 466 U.S. at p. 414; *Shaffer v. Heitner* (1977) 433 U.S. 186, 204.])" (*Vons*, *supra*, 14 Cal.4th at p. 458, italics added.)

Third, the *Vons* court emphasized that the ultimate goal of the due process clause is fairness. Therefore, a court determining specific jurisdiction should focus on the relationship between a nonresident's contacts with the State and the claim involved to ensure a nonresident defendant is not unfairly brought into court on the basis of random contacts. This does not require that the claim arise directly out of a defendant's contacts with California. To the contrary, the court determined, "When, as here, the

defendants sought out and maintained a continuing commercial connection with a California business [Foodmaker], *it is not necessary that the claim arise directly from the defendant's contacts in the state.*" (*Vons*, *supra*, 14 Cal.4th at p. 453, italics added.) "Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate. The due process clause is concerned with protecting nonresident defendants from being brought unfairly into court in the forum, on the basis of random contacts. That constitutional provision, however, does not provide defendants with a shield against jurisdiction when the defendant purposefully has availed himself or herself of benefits in the forum. The goal of fairness is well served by the standard ... that ... there must be a *substantial connection* between the forum contacts and the plaintiff's claim to warrant the exercise of specific jurisdiction." (*Id.* at p. 452.)

Although *Vons* arose in the context of a franchise relationship not unlike that in *Burger King*, our Supreme Court has not restricted its view of the relatedness requirement to that type of business or to non-resident franchisees that have agreed to litigate disputes with their franchisor in California. To the contrary, we have found in our own independent research that in *Snowney*, *supra*, 35 Cal.4th 1054, the court confirmed and extended its view of what is needed to satisfy the relatedness requirement. There, a group of Nevada hotels were sued by a class of hotel patrons who alleged that they had not been provided with notice of an energy surcharge imposed on all hotel guests. Although the

hotel defendants conducted no business and had no bank accounts or employees in California, they advertised heavily in California and obtained a significant percentage of their business from California residents. They also maintained an Internet web site and a toll-free phone number for customers to obtain room quotes and make reservations.

The trial court granted the hotels' motion to quash, but the Second District Court of Appeal reversed. Our Supreme Court took the case and published a superseding opinion agreeing with the appellate court that specific jurisdiction was appropriate over defendants.

As in *Vons*, the *Snowney* court reviewed the requirement of the Fourteenth Amendment that plaintiffs establish defendant's minimum contacts with California. It reiterated, as the Supreme Court had stated in *International Shoe* and other cases, that "[t]he test 'is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present.' " (*Snowney*, *supra*, 35 Cal.4th at p. 1061.) After determining that defendants' extensive advertising and internet solicitations within California met the minimum contacts requirement, the court turned to the relatedness requirement, and found that the controversy was related to or arose out of defendants' contacts with California. (*Id.*, at p. 1067.) In again applying its "substantial connection" test, the court reiterated its analysis in *Vons* that" 'for the purpose of establishing jurisdiction the intensity of forum contacts and the connection of the claim to those

contacts are inversely related.' [Citation.] '[T]he more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim.' [Citation.] Thus, '[a] claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction.' [Citation.] Moreover, the 'forum contacts need not be directed at the plaintiff in order to warrant the exercise of specific jurisdiction.' [Citing *Von*'s, *supra*.] Indeed, ' " '[o]nly when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that [contact].' " ' " (*Snowney* at p. 1068, quoting *Vons*, *supra*, 14 Cal.4th at pp. 452, 455.)[16]

Indeed, our Supreme Court has determined this "substantial connection" need not have any relevance to establishing the plaintiff's claim. As we discussed, *Cornelison*, *supra*, 16 Cal.3d 143 was relied on by the Vons court in its articulation of this "substantial connection" standard. (*Vons*, *supra*, 14 Cal.4th at pp. 445-446, 448.) In *Cornelison*, the defendant, a Nebraska resident and a commercial trucker, was sued by a plaintiff, a resident of California, in a California court for his negligence in causing an accident in Nevada that killed plaintiff's husband. The defendant was on his way to California when he was involved in the accident.

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[16] The court rejected the invitation of amicus curiae Chamber of Commerce of the United States to reconsider Vons and adopt the substantive relevance test of relatedness. (*Snowney*, *supra*, 35 Cal.4th at p. 1068.)

Our Supreme Court determined that "California, consistent with the due process clause of the United States Constitution, may assert jurisdiction over a nonresident individual whose essentially interstate business has a relationship to this state, but whose allegedly tortious acts occurred outside the state." (*Cornelison*, *supra*, 16 Cal.3d at p. 146.) Regarding whether there was a substantial connection between the defendant's contacts with California and the plaintiff's claim, the court relied in part on the fact that the defendant had significant contacts with California, coming into the state twice a month for seven years as a trucker under a California license, and that the accident occurred not far from the California border, while defendant was bound for the state. (*Id.* at p. 149.) However, what appears to have tipped the balance for the court was the "interstate character of defendant's business." (*Id.* at p. 151.) The court stated, "Defendant's operation, by its very nature, involves a high degree of interstate mobility and requires extensive multi-state activity. A necessary incident of that business was the foreseeable circumstance of causing injury to persons in distant forums. While the existence of an interstate business is not an independent basis of jurisdiction which, without more, allows a state to assert its jurisdiction, this element is relevant to considerations of fairness and reasonableness. The very nature of defendant's business balances in favor of requiring him to defend here." (*Ibid.*)[17]

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[17] Although not related to the substantial connection question, the court also referred to the fact that the plaintiff, also a witness to the accident, was a California resident, and that California had an interest in providing her with a forum for her

### C. *The "Minimum Contacts" and "Relatedness" Requirements are Met Here*

Although BMS's contacts with California that were described by the trial court no longer suffice under *Goodyear* and *Daimler* for assertion of general jurisdiction, they remain pertinent and persuasive for the first step of a specific jurisdiction analysis. BMS's extensive, longstanding business activities in California, including in particular its sale of 196 million Plavix pills between 1998 and 2006 and nearly $1 billion worth of Plavix in California between 2006 and 2012, five offices and facilities, hundreds of California-based employees and sales representatives, and long-time maintaining of an in-State agent for service of process bear no resemblance to the "random, fortuitous, and attenuated" interests held to be insufficient in *World-Wide Volkswagen* and *Walden*. They provide evidence of far more than the minimum contacts necessary under *International Shoe* to support the exercise of specific jurisdiction. Indeed, comparing the economic benefits BMS has derived from its California sales of Plavix and the extent and duration of its California contacts with those of the Washington franchisees in *Vons* and the Nevada hotels in *Snowney*, it is clear that BMS has far more contacts with California, including an extensive physical presence here. At oral argument, counsel for BMS conceded that BMS's contacts with

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claim. (*Cornelison*, *supra*, 16 Cal.3d at p. 151.) However, it also noted that some of the witnesses resided in Nevada. (*Ibid.*)

California satisfy the minimum contacts requirement for specific jurisdiction.[18]

The RPI have also satisfied the "relatedness" test because of the "substantial connection" between BMS's substantial, purposeful activities in California and the RPI claims. It is undisputed on

the record before us that, as stated by a BMS representative below via declaration, "BMS' work on the development, manufacture, labeling, and marketing of, and securing regulatory approvals for Plavix was performed or directed from BMS's New York headquarters and/or its New Jersey operating facilities. [¶] . . . None of the work to develop Plavix took place in California. Nor has BMS ever manufactured Plavix in California."

Nonetheless, it is also undisputed that BMS has had substantial, continuous contact with California for many years, including regarding the sale of Plavix. The evidence indicates that BMS has "deliberately exploited" the relevant market in the State (*Keeton*, *supra*, 465 U.S. at p. 781) for many years, having sold over 196 million Plavix pills in California between 1998 and 2006 and nearly $1 billion worth of Plavix between 2006 and 2012.

Further, plaintiffs allege BMS's Plavix sales in California have led to injuries to California residents that are the same as those suffered by the RPI. At

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[18] The nature and extent of BMS's contractual relationship with McKesson, and McKesson's relationship with the RPI, is not clear from the record. However, the fact that McKesson is headquartered in San Francisco is not disputed. Further, it is clear from the record that BMS has engaged McKesson as one of many distributors of Plavix over many years.

least 84, and perhaps as many as 251, California residents have sued BMS and McKesson in San Francisco because of perceived deficiencies in those pills which have caused such injuries in this state. If BMS is liable to any of the California plaintiffs because of proof which will be common for all plaintiffs, then those elements of each of the RPI's claims may also be established.

Moreover, the interstate character of BMS's business, and in particular its sales of Plavix, is also significant. In magnitudes far greater than was true regarding the relatively modest enterprise of the defendant trucker in *Cornelison*, a "necessary incident" of BMS's business is "the foreseeable circumstance of causing injury to persons in distant forums." (*Cornelison*, *supra*, 16 Cal.3d at p. 151.) While "not an independent basis of jurisdiction," it is relevant to a specific jurisdiction analysis. (*Ibid.*)[19]

Also, although the RPI injuries did not occur in the course of BMS's direct delivery of Plavix to the California market, plaintiffs allege, and the record suggests, that BMS sold product to both resident plaintiffs and the RPI as part of the distribution of Plavix in many states. In other words, the injuries are alleged to have occurred in the course of a common effort, another fact that weighs in favor of

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[19] As we have noted in footnote 9, *ante*, the *J. McIntyre* plurality disagreed with Justice Ginsburg's dissenting view that the marketing of a product with the expectation of nationwide sales was sufficient to support specific jurisdiction in that case. We do not mean to say it is sufficient by itself. However, nothing in *J. McIntyre* indicates it cannot be one of a number of factors considered in analyzing whether or not specific jurisdiction exists.

finding a "substantial connection" between BMS's contacts with California and the RPI's claims.

No California or federal case has been cited to us, and we have found none, in which this type of relationship between a non-resident corporate defendant, its very extensive California contacts, and the plaintiffs' claims has been examined. BMS does not discuss *Vons*, in its briefing, although the RPI do, and neither side discusses *Snowney*. Instead, BMS briefly discusses three earlier cases, an appellate court decision, *Spirits, Inc. v. Superior Court*, *supra*, 104 Cal.App.3d 918, 926, and two federal court decisions, *Glater v. Eli Lilly & Co.* (1st Cir.1984) 744 F.2d 213, 216 and *Jones v. N. Am. Aerodynamics, Inc.* (D.Me.1984) 594 F.Supp. 657, 660-662. At oral argument, counsel for BMS highlighted *Boaz v. Boyle & Co.* (1995) 40 Cal.App.4th 700, also briefly discussed in BMS's response to the amici for the RPI. *Boaz* is inapposite in light of the fact that it was conceded that the alleged injuries of the only California resident plaintiff had nothing to do with the California-related activities of the defendant who challenged jurisdiction, *none* of the plaintiffs' claims had *anything* to do with that defendant's contacts with California, and because of the modest nature of defendant's contacts, which were limited to "targeted mailers to physicians and advertising, principally if not entirely in national medical or medically related publications." (*Id.* at p. 717.) We do not find any of these cases persuasive regarding the present circumstances and need not discuss them further in light of our Supreme Court's later analyses and holdings in *Vons* and *Snowney*.

The reasoning of the United States and California Supreme Court cases we have discussed herein persuades us that BMS's activities are substantially connected to the RPI claims. In particular, the Supreme Court's analysis in *Keeton*, in which nonresident Hustler Magazine was required to appear in a New Hampshire court and answer charges that it had libeled non-resident plaintiff in numerous states via its sales of its magazine, even though only a small minority were sold in New Hampshire, indicates that a state court can assert jurisdiction against a nonresident accused by a nonresident of causing injuries, most of which occurred outside of the forum state. That both resident and non-resident plaintiffs are involved in the present suits (as opposed to the single plaintiff in *Keeton*) does not affect our conclusion.

Further, *Vons* teaches us that a defendant's contacts with California and their relatedness to the claims at hand are inversely related. (*Vons*, *supra*, 14 Cal.4th at p. 453.) In other words, " '[t]he more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim.' " (*Snowney*, *supra*, 35 Cal.4th at p. 1068, quoting *Vons*, *supra*, 14 Cal.4th at p. 455.) Thus, given BMS's substantial, continual contacts with California, including its extensive sales of Plavix here, the presence of dozens (not one or two) of resident plaintiffs who allege precisely the same wrongdoing by BMS and McKesson (also a California resident) as is alleged by the RPI, as well as the interstate nature of BMS's business and its nationwide sales of Plavix are even more significant in determining whether the RPI's

claims are sufficiently connected to BMS's California activity so that assertion of specific jurisdiction satisfies the traditional conception of fair play and substantial justice.

At oral argument, counsel for BMS suggested that finding specific jurisdiction appropriate in this case based on the similarity between the resident plaintiff's and the RPI's claims would permit "joinder to trump due process." This is not so. The identical nature of these claims is only one of a number of factors we have considered here. Further, it would be inappropriate to ignore so prominent an aspect of the matter before us as BMS asks us to do. As we have discussed, our own Supreme Court has noted that "the United States Supreme Court has rejected the use of 'talismanic jurisdictional formulas' (*Burger King*, *supra*, 471 U.S. at p. 485)" and instructed that "'"the facts of each case must [always] be weighed" in determining whether personal jurisdiction would comport with "fair play and substantial justice." '"(*Vons*, *supra*, 14 Cal.4th at p. 460.) Therefore, we decline to ignore the existence of the resident plaintiffs' claims in our relatedness analysis.

In short, we hold that the RPI have sustained their burden of showing sufficient contacts with California and the relatedness of these contacts to the claims at issue so as to satisfy the traditional test for specific jurisdiction under the United States and California Supreme Court cases discussed at length in this opinion.

### D. *BMS Has Not Met Its Burden of Showing "Unreasonableness"*

Having determined that the RPI have met their initial burden of demonstrating facts justifying the exercise of specific jurisdiction (*Snowney*, *supra*, 35 Cal.4th at p. 1062), we now turn to BMS's burden, which is to demonstrate " ' "that the exercise of jurisdiction would be unreasonable." ' " (*Ibid.*; see also *Burger King*, *supra*, 471 U.S. at p. 477 ["where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable"].)

In determining whether BMS has met its burden, we review the factors identified by the United States Supreme Court and our Supreme Court that are to be considered in determining whether requiring BMS to defend here comports with the traditional conception of fair play and substantial justice. An appellate court " ' "must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.' " ' "(*Snowney*, *supra*, 35 Cal.4th at p. 1070, quoting *Vons*, *supra*, 14 Cal.4th at p. 476 and *Asahi*, *supra*, 480 U.S. at p. 113.)

Although BMS did not concede that it cannot satisfy this burden, neither has it made any effort to show why it should not be required to defend here,

other than to argue that the RPI's claims are not sufficiently related to BMS's contacts with California. Nonetheless, we examine each of the factors and conclude BMS has not met its burden.

### 1. *BMS Has Not Shown Undue Burden In Defending Here*

BMS has provided no evidence that it would be unduly burdened if required to defend the RPI claims here. Nor could it. BMS may incur a substantial burden in defending the claims of the dozens, if not hundreds of California residents here. But whatever that burden proves to be, it will be incurred whether or not the RPI are allowed to bring their claims here as well.

While some additional burden may be attributed to defending the RPI's claims in addition to those of the California residents, BMS has made no effort to show what that burden would be, much less that it would be undue.

Further, whatever the incremental burden may be of combining the RPI's claims with those of the resident California plaintiffs, logic dictates that in order to determine whether it would be undue, BMS must show that it would be substantially greater than BMS would incur in defending each of the RPI's claims in his or her state of residence. Certainly if the RPI were forced to give up the benefits of combining their cases here, they would have the option of suing BMS in each of those states and not just in New York or Delaware.[20] Yet BMS has made

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[20] The RPI suggest that BMS seeks dismissal of their claims in order to force the RPI to refile in other states, allowing BMS to try again to remove the cases to federal courts and then have

no effort to address any difference in burden to it over defending in San Francisco versus the many other possible locations where the RPI could sue it.

To be sure, substantial pretrial preparation and discovery will be required in all of these cases. But the depositions of plaintiffs' prescribing and treating physicians, and of plaintiffs, will likely be taken in their states of residence regardless of where the RPI's claims are pursued. The discovery of BMS's key witnesses and documents will likely take place in New York and New Jersey, where those witnesses and key documents are likely located, regardless of where the RPI's claims are filed. BMS has not shown that any of these expenses will be greater if the cases proceed here.

Nor has BMS shown that the burden of having its counsel appear in San Francisco for case management conferences and hearings on motions will be any greater than would be the burden of appearing throughout the country. While it may be

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them transferred to the MDL court in the District of New Jersey, where its defenses might be more favorably received than in state courts. At oral argument, counsel for BMS did not dispute BMS's practice of removing cases against it to federal court and seeking to have them combined in the MDL proceeding in New Jersey. He candidly acknowledged that if each of the RPI is required to refile in his or her home state, New York, or New Jersey, fewer cases will be filed against BMS. BMS's due process rights do not include discouraging plaintiffs who may or may not have meritorious claims from pursuing them in an appropriate forum. Nor does due process entitle BMS to avoid the differences in procedures that exist between state and federal courts, such as regarding the standards for summary judgment, the admissibility of expert testimony, and the unanimity of jury verdicts.

less costly for counsel to travel to some parts of the country than to fly to San Francisco, because of the California residents' claims counsel will be coming here anyway and can coordinate any RPI-specific motion with other California activity.

Should plaintiffs' claims survive BMS's likely motions for summary judgment and should it prove necessary for one or more of these cases to be tried in order for the parties to agree upon a range of values upon which the rest likely will be settled,[21] once again, BMS has provided no evidence that trial in San Francisco would be more costly for it than trial in, for example, Portland, Chicago, Cleveland, or Dallas.

BMS has summarily argued that it would be prejudiced by not being able to bring witnesses to San Francisco for trial, such as plaintiffs' treating physicians and other experts. That argument ignores the teachings of *McGee* and *Burger King* that the inquiry into fairness must take into account modern developments in commerce, transportation, and indeed, the manner in which litigation is conducted. Excellent quality video depositions of trial witnesses, including parties and experts, are now the norm, not the exception, in high stakes

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[21] Professor Marc Galanter has reported that trials nationwide accounted for only 1.8 percent of dispositions in civil cases in 2002, down from 11.5 percent in 1962. (See Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* (2004) 1 J. Empirical Legal Studies 459, 462–463.) BMS has presented no data suggesting that the likelihood of trials in "big pharma" cases in California like this one approaches the national average as it existed in 2002 or today.

litigation such as this. Indeed, our Discovery Act has specific provisions for the taking of depositions outside California and for their use at trial.

In short, BMS has not demonstrated meaningful, much less undue, burden.

### 2. *California Has an Interest in Providing a Forum for the RPI's Claims*

As we discussed above, the paradigm case for the application of specific jurisdiction is when the out of state defendant causes injury to plaintiff in his or her home state and the suit is brought there. That is because the state has a " 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors" (*Burger King*, *supra*, 471 U.S. at p. 473), as well as a special interest in deterring wrongful conduct within its boundaries. (See, e.g., *Keeton*, *supra*, 465 U.S. at p. 776.) Because the RPI are not California residents and were not injured here, those state interests are diminished with respect to them.

But those state interests apply with full force to the dozens, if not hundreds, of California plaintiffs who are part of this suit. BMS would have us analyze its motion to quash as if those California plaintiffs play no role in the reasonableness analysis. They would also have us ignore the presence in this suit of co-defendant McKesson, which is based in San Francisco and which distributes Plavix for BMS. This is wrong.

It is true that, for purposes of determining minimum contacts, it is the contact of the defendant with the forum, and not that of the plaintiffs or codefendants, which is paramount. (*Walden*, *supra*,

134 S.Ct. at p. 1122-1123; *Vons*, *supra*, 14 Cal.4th at pp. 457-458.) But when examining the question of reasonableness, it is entirely appropriate to consider the convenience to other actors in this drama, meaning California resident plaintiffs and California-based co-defendant McKesson, of litigating claims with the RPI together in one action here when evaluating California's interest in providing a forum for this dispute. (See *Burger King*, *supra*, 471 U.S. at p. 473.) And because the claims of the California plaintiffs are the same as the claims of the RPI, and because BMS has sold many tens of millions of Plavix pills to California residents, California has an interest, if not as strong an interest, in deterring dangerous conduct with respect to the RPI. BMS has not shown otherwise.

### 3. *Plaintiffs Have Demonstrated Interest In San Francisco as a Convenient and Effective Forum*

Plaintiffs' counsel in this matter hale from New York, California and Washington D.C. They have decided to bring these actions in California, they say, because a plurality of the plaintiffs in the original group of 659 are California residents. Further, they argue, but without providing competent evidence, California provides a forum in which they can sue both BMS and McKesson in the same case or cases. Be that as it may, plainly plaintiffs' position is that the San Francisco Superior Court provides a convenient and effective forum. Given this assertion, we see no reason why they should not be allowed to proceed here, absent a jurisdictional or other compelling reason to the contrary. BMS has not provided one.

**4. *Judicial Economy***

BMS has made no attempt to demonstrate that judicial economy would not be served by allowing these cases to go forward here. Nor could it. While there will undoubtedly be an incremental burden on the superior court in managing the RPI cases along with those of the California resident plaintiffs, that burden pales in comparison with requiring judges in 33 states all to become involved in the discovery, motion, and trial practice that may be necessary to resolve these cases. Indeed, it pales in comparison with the incremental burden of asking the trial court just to coordinate its cases with those in multiple other jurisdictions so that, for example, the same discovery issues are not litigated and relitigated time and again, such as because of protective orders regarding confidentiality adopted at BMS's request.

Further, allowing these cases to go forward here will benefit not only all plaintiffs and the courts, but defendant. It is difficult to see how it would be more efficient for BMS to litigate the same issues in multiple fora throughout the country. To the extent that the RPI would be discouraged from suing BMS in many states where no "critical mass" exists to support a common effort against BMS, that possibility does not weigh in favor of granting BMS's motion.[22] Be that as it may, BMS has not shown how judicial economy would be served by granting its motion to quash.

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[22] See footnote 20, *ante*.

### III. *Pendent Personal Jurisdiction*

The RPI mention, but make no effort to develop, an argument pertaining to "pendent personal jurisdiction." Amici for the RPI, Consumer Attorneys of California and American Association for Justice, develop that theory through discussion of such cases as *Action Embroidery Corp. v. Atlantic Embroidery, Inc.* (9th Cir.2004) 368 F.3d 1174 (*Action Embroidery*). A review of those cases makes clear that "pendent personal jurisdiction" is a federal common law doctrine developed to permit jurisdiction over non-resident defendants with respect to state law claims brought under the federal courts' discretionary supplemental jurisdiction. It was developed because some federal law claims, such as violations of the federal antitrust laws, may be brought in any federal district court (subject to venue considerations). However, related state law claims "aris[ing] out of the same nucleus of operative facts" require a showing of appropriate personal jurisdiction under the laws of the state where such state law claims were brought. To avoid piecemeal litigation of claims brought by the same plaintiff against the same defendant, this doctrine was developed.

Contrary to the arguments of amici, "pendent personal jurisdiction" has no bearing on the analysis of whether claims by non-resident plaintiffs, that is, different plaintiffs, may proceed with those of resident plaintiffs. However, the policy reason at the heart of pendent personal jurisdiction is equally applicable here: As Judge William Fletcher wrote in *Action Embroidery*: "When a defendant must appear in a forum to defend against one claim, it is often

reasonable to compel that defendant to answer other claims in the same suit arising out of a common nucleus of operative facts. We believe that judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties is best served by adopting this doctrine." (*Action Embroidery*, *supra*, 368 F.3d at p. 1181.) While pendent personal jurisdiction has no application to the issues before us, the policy behind it of encouraging judicial economy, avoiding piecemeal litigation, and encouraging convenience of the parties applies here with equal force.

## DISPOSITION

For the foregoing reasons, the trial court properly denied BMS's motion to quash service of the summons regarding the RPI complaints. The order to show cause is DISCHARGED. The petition is denied.

We concur:

Kline, P.J.

Richman, J.

Cal.App. 1 Dist., 2014

Filed: July 30, 2014

## APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
DEPARTMENT 305

Judicial Council Coordinated
Proceeding No. 4748

Coordination Proceeding
Special Title
[Rule 3.550]

**PLAVIX PRODUCT AND MARKETING CASES**

## ORDER DENYING DEFENDANT BRISTOL-MYERS SQUIBB COMPANY'S MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION

Defendant Bristol-Myers Squibb Company ("BMS") moves the Court for an order quashing service of the summons and complaint upon it in these coordinated cases for lack of personal jurisdiction. For the reasons that follow, the Court denies the motion.

Plaintiffs allege that they suffered bodily injury and economic harm by using Plavix, a drug manufactured and sold by BMS. The claims are brought by 659 plaintiffs, 575 of whom reside outside of California. BMS contends that this Court lacks

personal jurisdiction over the claims of 575 of the plaintiffs because those plaintiffs are "not residents of California and do not allege any connection with this State or with each other." Notice at p. 1.

The standards for the exercise of personal jurisdiction by a state over a defendant are well-settled:

> There are two concepts of personal jurisdiction upon which the state can base jurisdiction over a defendant: general jurisdiction and special, or transactional, jurisdiction. California's long-arm statute authorizes California courts to exercise jurisdiction over nonresidents on any basis not inconsistent with the federal or state Constitution. (Code Civ. Proc., § 410.10.) The due process clause of the United States Constitution permits personal jurisdiction over a party in any state with which the party has "certain minimum contacts ... such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316 (1945). "If a nonresident's activities are sufficiently wide-ranging, systematic and continuous, it may be subject to jurisdiction within the state on a cause of action unrelated to those activities. [General jurisdiction.]" *Walter v. Superior Court* (1986) 178 Cal.App.3d 677, 680.

*Hesse v. Best Western Internat., Inc.* (1995) 32 Cal.App.4th 404, 408 (internal quotations omitted). Those standards were left undisturbed by the Supreme Court in *Goodyear Dunlop Tires Operations, S.A., v. Brown* (2011) 131 S.Ct. 2846, the

case upon which BMS principally relies. In short, a defendant's wide-ranging, systematic and continuous contacts with a forum state justify the exercise of general jurisdiction over that defendant.

BMS sold nearly $1 billion worth of Plavix in California between September 2006 and November 2012. Ezrin Decl. ¶ 3, Ex. A. BMS sold over 196 million Plavix pills in California between 1998 and 2006. Ezrin Decl. ¶ 4, Ex. B. Since 1936, BMS has been registered with the service of process in Los Angeles. Ezrin Decl. ¶ 6, Ex. D. According to the Declaration of Glenn Gerecke, BMS's Vice President, Engineering and Facilities Services:

> BMS operates five offices in California that employ approximately 164 people. In addition, BMS employs approximately 250 sales representatives who serve in California. One of BMS's offices, in Milpitas [California], is owned by BMS, and the remainder are leased. The Milpitas facility is used primarily for research and employs 85 people. Three other offices are primarily used as research and laboratory facilities. They are located in Aliso Viejo, San Diego and Sunnyvale [California]. A small office in Sacramento is used by the company's Government Affairs group.

Gerecke Decl. ¶ 3 (McLaughlin Decl. Ex. C).

BMS contends that these facts do not warrant this Court's exercise of general jurisdiction over it. The Court disagrees.

The Court in *Hesse* determined that California courts had general jurisdiction over an out-of-state hotel company based on contacts with California far

less extensive than BMS's here. *Hesse*, *supra*, 32 Cal.App.4th 404 at 407-08. BMS's wide-ranging, continuous, and systematic activities in California, as detailed above, are clearly sufficient to establish that Court's has general jurisdiction over it. Because BMS engages in extensive activities in California, and thus enjoys the benefits and protections of its laws, this Court's exercise of jurisdiction over BMS comports with "traditional notions of fair play and substantial justice." *International Shoe*, *supra*, 326 U.S. 310, 316, 319. BMS's conduct in and connection with California are such that BMS "should reasonably anticipate being haled into court" here. *World-Wide Volkswagen Corporation v. Woodson* (1980) 444 U.S. 286, 297.

BMS's Motion is denied.

**IT IS SO ORDERED.**

September 23, 2013.

*/s/ John E. Munter*

John E. Munter

Judge of the San Francisco Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

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Case No. CJC-13-004748

---

Coordination Proceeding
Special Title
[Rule 3.550]

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**PLAVIX PRODUCT AND MARKETING CASES**

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**CERTIFICATE OF ELECTRONIC SERVICE (CCP 1010.6(6) & CRC 2.260(g))**

I, Craig Blackstone, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On September 23, 2013, I electronically served the ORDER DENYING DEFENDANT BRISTOL-MYERS SQUIBB COMPANY'S MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION via File & ServeXpress on the recipients iesignated on the Transaction Receipt located on the File & ServeXpress website.

Dated: September 23, 2013

T. Michael Yuen, Clerk

By: */s/ Craig Blackstone*

Craig Blackstone, Deputy Clerk

SUPREME COURT, U.S.
FILED
DEC - 7 2016
OFFICE OF THE CLERK

No. 16-466

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

*Respondent.*

On Petition for a Writ of Certiorari to the California Supreme Court

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Petitioner is a drug manufacturer that sold a drug nationally with the assistance of a California distributor. Through those nationwide efforts, petitioner specifically sold massive amounts of the drug in California. Petitioner also has other substantial operations in California, including relating to the development of drugs.

California and non-California residents brought products liability claims in California state court arising from the national marketing and sale of the drug.

The California state courts indisputably have jurisdiction over the claims of *both* the California and non-resident plaintiffs. Petitioner admits that it is subject to specific personal jurisdiction with respect to the claims of California plaintiffs. The California courts also undoubtedly have jurisdiction over the claims of the *non*-resident plaintiffs against the California distributor.

The Question Presented is:

Whether in these circumstances the Constitution immunizes petitioner from the personal jurisdiction of the state courts with respect to the claims of non-resident plaintiffs arising from the identical factual allegations as those plaintiffs' claims against the in-state distributor and the resident plaintiffs' claims against petitioner itself.

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## BRIEF IN OPPOSITION

Respondents respectfully request that the Petition for a Writ of Certiorari should be denied.

## STATEMENT OF THE CASE

1. Petitioner Bristol-Meyers Squibb (BMS) is a Delaware corporation with substantial operations in California, including five offices that perform research and development. Pet. App. 4a-5a. BMS also employs approximately 250 sales representatives in California, has a government advocacy office in Sacramento, has been registered with the California Secretary of State to conduct business in the State since 1936, and maintains a registered agent for service of process in the State. *Id.*

BMS manufactures, markets, and sells the anti-clotting drug Plavix throughout the United States using nationwide marketing campaigns. BMS specifically distributes Plavix nationally through agreements with McKesson Corporation, which has its principal place of business in San Francisco, California.

From 2006-2012, BMS marketed, distributed, and sold over 180 million Plavix pills to distributors and wholesalers in California alone, generating sales revenue of nearly $1 billion. *Id.*

2. Although BMS marketed Plavix as "providing greater cardiovascular benefits, while being safer and easier on a person's stomach than aspirin," *id.* at 3a, the actual reality was that the drug created a substantial risk of "heart attack, stroke, internal bleeding, blood disorder[s] or death," *id.* at 3a-4a. On that basis, residents of California and other states

sued both BMS and McKesson in California state court. *Id.* at 2a-4a.

Respondents all stated products liability claims resting on the conduct of BMS and McKesson in the design, development, manufacture, testing, marketing, labelling, and sale of Plavix. *Id.* All the complaints allege "the same" claims. *Id.* at 3a. The California resident plaintiffs do not allege any facts specific to acts in that state that distinguish their claims from those of the non-resident plaintiffs.

The actions were coordinated before the San Francisco Superior Court. *Id.* at 4a. California's long-arm statute grants the state courts personal jurisdiction to the full extent of the Due Process Clause of the Fourteenth Amendment. *Id.* at 6a.

In this case, it is undisputed that the California court will adjudicate the substance of the claims of both the resident and non-resident plaintiffs, and that BMS will be a party to all that litigation. That is so because the California courts have jurisdiction over claims brought by all the plaintiffs – *both* resident and non-resident. BMS itself concedes that it is subject to personal jurisdiction with respect to the residents' claims. Pet. App. 95a-96a n.2 (Cal. Ct. App. opinion). McKesson does not challenge jurisdiction with respect to either the resident or non-resident plaintiffs.

BMS did seek to dismiss the case in part, arguing that the court lacked jurisdiction to adjudicate BMS's own liability (as opposed to that of McKesson) to the non-residents (as opposed to the residents). In other words, although BMS acknowledges that it will participate in the litigation of these very claims by both the resident and non-resident plaintiffs, it argues

that the Constitution requires cleaving off one subset of its liability to one subset of the plaintiffs, who presumably would be required to relitigate all the same questions once again in their home states.

The Superior Court rejected that argument. *Id.* at 5a-6a (Cal. Sup. Ct. opinion). BMS petitioned the Court of Appeals for a writ of mandate, which the Court of Appeals summarily denied. *Id.* The Supreme Court of California remanded for consideration of this Court's intervening ruling governing general jurisdiction in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The Court of Appeals again denied the writ. Pet. App. 6a.

The Supreme Court of California affirmed. *Id.* at 44a-45a. First, applying *Daimler*, it held that BMS was not subject to general jurisdiction in California. The court reasoned that general personal jurisdiction would only be found in those states in which BMS is "at home" – Delaware (where it is incorporated) or New York or New Jersey (where it has its principal place of business). *Id.* at 16a-19a.

The Court then concluded that "under the particular circumstances present here" the California courts have specific personal jurisdiction over BMS with respect to the non-resident plaintiffs' claims that arise from the identical facts as those of the resident plaintiffs. *Id.* at 20a-44a. The relevant legal test, it explained, is "well settled":

> The question of whether a court may exercise specific jurisdiction over a nonresident defendant involves examining (1) whether that defendant has "purposefully directed" its activities at the forum; (2) whether the

> plaintiff's claims arise out of or are related to these forum-directed activities; and (3) whether the exercise of jurisdiction is reasonable and does not offend "traditional notions of fair play and substantial justice."

*Id.* at 20a-21a (citations omitted).

Although BMS conceded the first and third factors, the Court addressed each. First, it found that "there is no question that BMS has purposefully availed itself of the privilege of conducting activities in California." *Id.* at 22a-25a. "Not only did BMS market and advertise Plavix in this state, it employs sales representatives in California, contracted with a California-based pharmaceutical distributor, operates research and laboratory facilities in this state, and even has an office in the state capital to lobby the state on the company's behalf." *Id.* at 24a-25a. "On the basis of these extensive contacts relating to the design, marketing, and distribution of Plavix, BMS would be on clear notice that it is subject to suit in California concerning such matters." *Id.* at 25a-35a.

Second, the Court found that the non-resident plaintiffs' claims were significantly related to BMS's contacts with California, "taking into account *all* of BMS's activities in this state and their relation to the causes of action at issue here." *Id.* at 25a-35a. The Court found it significant that BMS did not dispute that all the plaintiffs' claims – including those of the resident plaintiffs over which the California courts indisputably have jurisdiction – arose from the same conduct: BMS's "common nationwide course of distribution." *Id.* at 25a-29a. BMS thus had not "asserted that either the product itself or the

representations it made about the product differed from state to state." *Id.* at 28a. Further, and critically, "BMS does not contest that its marketing, promotion, and distribution of Plavix was nationwide and was associated with California-based sales representatives and *a California distributor, McKesson Corporation, which plaintiffs allege is jointly liable.*" *Id.* (emphasis added). Further, "BMS's research and development activity in California provides an additional connection between the nonresident plaintiffs' claims," which include the allegation that "BMS engaged in a course of conduct of negligent research and design that led to their injuries." *Id.* at 29a.

The Court distinguished the facts of this case from one in which the claims of resident and non-resident plaintiffs were merely "parallel." *Id.* at 29a. Although "BMS contends that the nonresident plaintiffs' contacts would be exactly the same if BMS had no contact whatsoever with California," the Court rejected that argument, explaining that it entirely "ignores the uncontested facts that *all* the plaintiffs' claims arise out of BMS's nationwide marketing and distribution of Plavix." *Id.* (emphasis added). Thus, the claims of both the resident and non-resident plaintiffs were not based on merely "similar" conduct, but the exact same singular and coordinated marketing and distribution scheme. *Id.* at 29a-30a.

Third, the Court explained that – as BMS itself conceded – the assertion of specific personal jurisdiction would "comport with traditional notions of fair play and substantial justice." *Id.* at 35a-44a (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). BMS inevitably must defend against the

parallel claims of California residents arising from the same operative facts, in a suit that moreover will adjudicate the claims of the non-residents against McKesson involving those same facts. Hearing all claims in one forum would not be more burdensome – indeed, would be substantially less burdensome – than hearing them in a "scattershot manner" in multiple states. *Id.* at 37a-38a.

The Court also explained that the California Civil Procedure Code provides for avenues for taking out-of-state depositions of key witnesses, such as treating physicians. *Id.* Further, the State has an interest in both regulating the conduct of McKesson *and* providing a forum for non-residents when information associated with their claims is intrinsically related to the claims of its residents. *Id.* at 38a-41a.

The dissenting justices recognized that BMS "contests neither the first prong" (purposeful availment) "nor the third" (reasonableness) of the specific personal jurisdiction analysis. *Id.* at 46a-86a (Werdegar, J., dissenting). But the dissent adopted a different characterization of the non-residents' claims. It viewed them as "merely parallel" to the residents' claims, *id.* at 56a, focusing on the fact that none of the non-resident plaintiffs purchased or ingested Plavix in California and that Plavix was not manufactured, developed, nor labelled in California. *Id.* at 46a-51a.

## REASONS TO DENY THE WRIT

### I. The Ruling Below Does Not Implicate Any Conflict In The Lower Courts.

At a high level of generality, petitioner alleges a conflict in the lower courts over the standard for determining specific personal jurisdiction. Although that claim is substantially overstated, it is also irrelevant. Petitioner identifies no ruling from any court rejecting the assertion of jurisdiction on similar facts, much less a clear conflict requiring this Court's intervention. The holding below instead turns on – and is by its terms limited to – the fact that the non-resident claims against petitioner in fact are substantially related to California in several respects, and that petitioner inevitably will litigate the same allegations in a California court that will also adjudicate the parallel claims of the non-resident plaintiffs against a California entity.

Rather than adopting any sort of categorical rule, the majority below was clear that "the minimum contacts test is applied on a case-by-case basis, focusing on the nature and quality of the defendant's activities in the state." *Id.* at 35a (majority opinion). That is entirely appropriate. This Court has explained that with respect to personal jurisdiction "few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable." *Kulko v. Super. Ct.*, 436 U.S. 84, 92 (1978). The "minimum contacts" analysis "is not susceptible of mechanical application." *Id.*; *see also Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 307 (1992) (describing the personal jurisdiction analysis as a "flexible approach").

Petitioner claims that courts have rejected specific personal jurisdiction in two analogous cases – just two. The *more recent* one was decided *thirty-two years ago*. The very fact that petitioner's authority is so thin is evidence enough that certiorari is not warranted. There also has been significant water under the bridge with respect to specific personal jurisdiction in the intervening decades, so there is reason to doubt whether those rulings even remain good law. *See, e.g.*, Pet. xii-xv (citing eight jurisdictional rulings of this Court from 1984 or later). But in any event, both of those appellate decisions are easily distinguishable for exactly the reasons given by the California Supreme Court.

In *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir. 1971), three individual plaintiffs – all non-residents – brought products liability claims in South Carolina against two non-resident drug companies that did not even have an office in the state. The plaintiffs sued there as a legal strategy to expand the defendants liability, because South Carolina was the only relevant state in which the statute of limitations had not run. They asserted that the state court had personal jurisdiction merely because the drug company sold the drug in the state. The court rejected that argument without difficulty: "When, however, defendant's only activities consist of advertising and employing salesmen to solicit orders, we think fairness will not permit a state to assume jurisdiction." *Id.* at 748. But the court recognized that jurisdiction would be appropriate if the "other contacts between the corporation and the state" were "*fairly extensive*." *Id.* (internal quotation marks omitted).

In *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984), a single non-resident plaintiff brought suit in New Hampshire against a non-resident drug company, which did not even sell drugs directly in the state. The plaintiff asserted that jurisdiction existed solely because of certain indirect sales into New Hampshire. As the court explained, that was merely the assertion that every "nonresident injured out of state by a drug sold and consumed out of state[] could bring suit in New Hampshire." *Id.* at 216 n.4. The court summarily rejected that argument, explaining that "[w]e do not think that Lilly's sales of DES in New Hampshire can be said to be related to Glater's injury." *Id.* at 216.

Neither the 1971 decision in *Ratliff* nor the 1984 ruling in *Glater* has any – much less all – of the features that the California Supreme Court deemed essential to finding specific personal jurisdiction in this case. *Ratliff* in fact holds that jurisdiction would be appropriate if the drug company's ties to the state were "*fairly extensive*." The manufacturer in *Glater* made no sales in the forum state, instead selling to distributors who themselves would sell within New Hampshire. *Glater*, 744 F.2d at 214-15. The manufacturers in *Ratliff* lacked any offices in the state or warehouses to store goods in the state; they had no personal property or bank accounts in the state; and only one defendant had "detail men" in the state. 444 F.2d at 748. At best, the only contacts between the state and the defendants were some direct-to-doctor advertisements and the presence of a few salesmen in the state. *Id.* at 746.

Here, it is undisputed that in this very litigation in which BMS will be a party the state court is

properly adjudicating both (i) claims against BMS arising from the same factual allegations, and (ii) claims involving those same events brought by the non-resident plaintiffs against McKesson. So any claim that BMS will be unduly burdened by litigating in California rings hollow. Even more important, the same marketing and distribution activities that give rise to the residents' claims against BMS also give rise to the non-residents' claims.

Further, in this case, the non-resident plaintiffs' claims *directly* involve BMS's nationwide marketing activities with McKesson, a California corporation. BMS also has substantial research and development facilities in California, which the state court concluded were relevant to the non-resident plaintiffs' claims regarding BMS's practices in developing drugs.

The California Supreme Court specifically distinguished *Glater* on that basis and made clear that it would have found jurisdiction lacking on the facts of that very different case. Petitioner states that the California court merely reasoned that "the First Circuit does not apply a 'sliding scale approach to specific jurisdiction.'" Pet. 18. That is not true. The Court actually reasoned: "Although the facts of *Glater* [] also involve the sales and marketing of an allegedly defective drug, the pharmaceutical company's contacts with the forum state, New Hampshire, appear to have been far less substantial than BMS's contacts to California." Pet. App. 31a.

More broadly, petitioner urges this Court to grant review based on a supposed generalized conflict over whether specific personal jurisdiction is evaluated on the basis of a "sliding scale." But this case is not a

vehicle to resolve any such conflict. At the very least, there is no indication whether the resolution of that supposed disagreement would affect the outcome of this case. Here, it is an academic question. No court applying any standard has rejected the assertion of specific personal jurisdiction in circumstances comparable to these.

Petitioner also omits that California has applied its rule for decades, and this Court has declined multiple requests to review those rulings. Those cases were far superior vehicles to decide the question presented, because neither involved contacts with the forum state that were nearly as extensive. *See, e.g.*, *Harrah's Las Vegas, Inc. v. Snowney*, 546 U.S. 1015 (2005) (single plaintiff suit against nonresident defendants); *Wash. Rest. Mgmt. v. Vons. Co., Inc.*, 522 U.S. 808 (1997) (same). This Court has also declined to review the rulings of other Circuits and states that apply the California approach to the relatedness inquiry. *See, e.g.*, *Avocent Huntsville Corp. v. Aten Int'l Co.*, 557 U.S. 904 (2009) (denying certiorari from decision of Federal Circuit declining to find personal jurisdiction for declaratory judgment action based on threat of enforcement of patent); *Shoppers Food Warehouse MD Corp. v. Moreno*, 530 U.S. 1270 (2000) (denying certiorari from decision of D.C. Court of Appeals on rehearing en banc, over two dissenting opinions, finding personal jurisdiction due to non-resident defendant's extensive advertising activity in the District); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 516 U.S. 1017 (1995) (denying certiorari from decision of Minnesota Supreme Court finding personal jurisdiction for declaratory judgment action brought by non-resident insured against Canadian insurer to

determine coverage of policy); *cf. Chew v. Dietrich*, 525 U.S. 948 (1998) (denying certiorari from decision of Second Circuit, who in applying their relatedness test, explained that "[w]here the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury," *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998)).

Petitioner nonetheless argues that – although it cannot identify any analogous cases – jurisdiction would necessarily be denied in courts requiring that a defendant's forum state contacts "in some way *caused* the plaintiff's injury," Pet. 9-10, including because those activities must be a "but for" cause of the injury, *id.* 11-12. This case supposedly implicates that rule because petitioner represents – time and again – that the California Supreme Court "did not dispute that respondents' 'claims would be exactly the same if [Bristol-Myers] had no contact whatsoever with California.'" Pet. 3; *see also id.* 12, 17, 33. That characterization of the opinion is inexplicable. The sentence petitioner quotes actually just restates petitioner's own argument. Petitioner omits that the sentence actually begins: "BMS contends . . . ." Pet. App. 29a. Then the opinion's next sentence expressly (and correctly) rejects BMS's contention: "This characterization ignores the uncontested fact that all the plaintiffs' claims arise out of BMS's nationwide marketing and distribution of Plavix." *Id.* The Court thus recognizes that an essential element of BMS's contacts with California was the nationwide

marketing and distribution of Plavix that give rise to the claims of both the residents and non-residents. *Id.*

Even if that were not so, there would be no conflict between the ruling below and the decisions cited by petitioner. As discussed, the Supreme Court of California identified and relied upon two other substantial contacts between BMS and the State that are directly involved in the case. BMS distributed Plavix to non-residents through McKesson, a California company. And BMS's research and development activities in California were related to the claims of the non-residents of flaws in BMS's drug development practices.

By contrast, the cases cited by petitioner as embodying the supposed circuit conflict, Pet. 11-16, arise from a common – and easily distinguished – fact pattern. They involve individual non-resident plaintiffs suing a non-resident defendant with little to no relevant contact with the forum. None involve comparable contacts to this case.

Just as important, none involve many plaintiffs, both resident and non-resident, in a mass action arising from identical facts. Mass actions are fundamentally different from traditional litigation, raising distinct questions about fairness to the litigants and to the states themselves. This is particularly true of mass actions where – as in this case – the non-resident defendant is indisputably subject to the personal jurisdiction of the forum's courts for some plaintiffs; all the plaintiffs bring essential identical claims; and the non-resident defendant will inevitably be a party to the litigation of the claims of the non-residents. In such a case, there

is no inherent unfairness to the non-resident defendant, and the nation's judicial systems operate far more efficiently by adjudicating the indistinguishable claims together. The concerns raised by a mass action such as this are *exactly* why this Court has eschewed a formulaic approach to the inherently flexible Due Process analysis associated with personal jurisdiction.

## II. The Ruling Below Does Not Conflict With This Court's Precedents.

There is no merit to BMS's argument that the ruling below conflicts with this Court's rulings. In BMS's view, specific personal jurisdiction exists only if the defendant's in-state activities give rise to the plaintiff's claims. That is not correct. In *Helicopteros Nacionales de Col., S.A. v. Hall*, 466 U.S. 408 (1984), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), this Court concluded that the plaintiff's claim must *either* "arise out of *or* relate to," the defendant's contacts with the forum. *Burger King*, 471 U.S. at 472 (emphasis added) (internal quotation marks omitted).

BMS focuses on *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). Pet. 20-21. But *Goodyear* involves general jurisdiction, not specific jurisdiction. The relevant legal standards are of course entirely different. *Goodyear* mentioned specific jurisdiction in passing dictum, restating the traditional test that specific jurisdiction "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." 564 U.S. at 919 (internal quotation marks omitted). There is no conflict between that rule and the decision below.

Nor is there tension – much less conflict – between the ruling below and *Walden v. Fiore*, 134 S. Ct. 1115 (2014), which reiterated that the "[w]ell-established principle[]" that the "defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* at 1121. For the reasons given by the Supreme Court of California and discussed above, that standard is satisfied here.

BMS's only answer is to claim that the Court sweepingly held that specific personal jurisdiction exists whenever a defendant has "a national marketing strategy." Pet. 23. That caricature bears no resemblance to the ruling below. In fact, BMS's national marketing and distribution are relevant only because they form the identical basis for the claims of both the resident and non-resident plaintiffs. But there is much more in this case, and the ruling below makes clear those additional facts are essential. Among other things, BMS distributed the drug to the non-residents under agreements with a California distributor and BMS's operations in California are directly relevant to the non-residents' claims. Further still, BMS is inevitably participating in the litigation of these claims in the California court by the resident plaintiffs.

Those facts also explain why BMS errs in arguing that the ruling below nullifies this Court's holding in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *Daimler*, like *Goodyear*, involves general jurisdiction. The California Supreme Court expressly applied *Daimler* to hold that general jurisdiction is lacking against BMS. The Court then explained why its specific jurisdiction ruling did not open the door to

sweeping assertions of jurisdiction against corporations that operate nationally:

> BMS's argument overstates the effect of our conclusion that specific jurisdiction is properly exercised here. Our decision does not render California an all-purpose forum for filing suit against BMS for *any* matter, regardless of whether the action is related to its forum activities. We simply hold under this specific set of circumstances that, for purposes of establishing the requisite minimum contacts, plaintiffs' claims concerning the allegedly defective design and marketing of Plavix bear a substantial nexus with or connection to BMS's extensive contacts with California as part of Plavix's nationwide marketing, its sales of Plavix in this state, and its maintenance of research and development facilities here so as to permit specific jurisdiction.

Pet. App. 35a.

Of note, in response to a comment by Justice Sotomayor in her concurrence, the *Daimler* majority noted "the many decades in which specific jurisdiction has flourished" and explained that specific jurisdiction continued to exist to prevent any "deep injustice[s]" created by the Court's narrowing of general personal jurisdiction. 134 S. Ct at 758 n.10. The *Goodyear* Court only mentioned specific jurisdiction in passing, restating the traditional test that specific jurisdiction "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes

jurisdiction." 564 U.S. at 919 (internal quotation marks omitted).

There accordingly is no conflict between the ruling below and this Court's precedents.

## III. This Case Is A Poor Vehicle In Which To Decide The Question Presented.

Contrary to petitioner's submission, assuming that the question presented ever warrants review, this case would be a poor vehicle to decide it. Although this Court has granted certiorari in a case involving the "relatedness" inquiry for specific personal jurisdiction, this is a very different case. As discussed, here there are significant links between petitioner's activities in the forum and the non-resident plaintiffs' claims.

To the extent this question requires resolution—and it does not—a much better vehicle would be for the Court to grant certiorari for a case where the outcome-determinative issue was a choice between but for and proximate causation. Such a case would allow the Court to both determine if causation is a required element of the relatedness inquiry and then, if necessary, resolve *which* causation test is proper. Thus, the Court should wait until presented with a situation where the choice of a but for or proximate causation test is itself dispositive. Indeed, that is *exactly* what the Court did in granting certiorari in *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), where the Ninth Circuit's use of the proximate causation test over the but for test was outcome determinative. *Compare id.* at 383 ("Were this court to apply the [proximate causation] 'arising from' analysis . . . to this case, we would conclude that Mrs. Shute's

fall did not arise out Carnival's solicitation of business in Washington."), *with id.* at 385-86 ("Applying the [but for] standard, we conclude that the Shutes' cause of action arose out of Carnival's contacts with Washington."). Although the Court unsurprisingly passed on resolving the relatedness inquiry and reversed the Ninth Circuit on alternative grounds, that case presents the paradigmatic structure for a proper vehicle to resolve this dispute. If the Court felt the need to speak on this issue, it should wait for a case more similar to *Shute*. And, as the amici explain, the Court should not have to wait long for such a case considering the frequency at which specific personal jurisdiction is adjudicated by the courts.

For similar reasons, this case involves much more complicated considerations with far greater implications for class action litigation. If petitioner's argument were accepted, it is difficult to see how many nationwide mass and class actions could proceed on the basis of specific personal jurisdiction. In petitioner's view, in the great majority of cases, no court in which the defendant is not subject to general jurisdiction could adjudicate the claims of plaintiffs from multiple states. That is not the accepted rule in any jurisdiction of which we are aware. It has the potential to radically transform American class action litigation. Before this Court undertakes such a question, the issue should be permitted to percolate to a substantially greater extent in the lower courts, which thus far have not considered it.

This case is also a poor vehicle to decide the question presented because of BMS's unusual choices in litigating it below. BMS conceded the third prong of the specific personal jurisdiction inquiry. Pet. App.

138a-39a (Cal. Ct. App. Opinion). Once the plaintiff has established minimum contacts under the purposeful availment and relatedness prongs, the defendant can show that assertion of personal jurisdiction would not be reasonable and would offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987) (internal citation omitted). In determining whether assertion of jurisdiction is reasonable, the court considers "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief," along with "the interest judicial system's interest in obtaining the most efficient resolution of the controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* These are, in essence, considerations of fairness to the defendant. This step is the proper time for the court to balance factors such as the effect of asserting jurisdiction on business development within the state or evidentiary difficulties facing the defendant, such as obtaining the testimony of non-forum witnesses or experts.

BMS, however, did not contest that assertion of jurisdiction would be unreasonable, instead entirely focusing its argument on the relatedness prong. Pet. 9-33. In this case, this Court would accordingly be substantially hamstrung in resolving the issue because of petitioner's concession. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (noting that "reasonableness" is central to the due process analysis). Indeed, the Petition *expressly* limits the question presented to the "relatedness" inquiry, rather than the general question of whether the assertion of

specific personal jurisdiction comports with Due Process. Pet. i.

## CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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December 7, 2016

Supreme Court, U.S.
FILED
DEC 20 2016
OFFICE OF THE CLERK

No. 16-466

IN THE
# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the California Supreme Court**

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## RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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## REPLY BRIEF IN SUPPORT OF CERTIORARI

## INTRODUCTION

Respondents' brief in opposition is more notable for what it doesn't say than what it does. Respondents do not deny that there is a deep and intractable split on what it means for a plaintiff's claims to "arise out of or relate to" a defendant's forum contacts. Respondents do not deny that the Court's past cases stated that a court would not have specific jurisdiction over a product-liability suit similar to respondents'—where the injury occurred and the product was manufactured and sold outside the forum. And respondents do not deny that in every case where this Court has found specific jurisdiction over a defendant proper, there has been at least a but-for

causal connection between the defendant's forum contacts and the plaintiff's claims—a connection that the California Supreme Court did not demand of respondents' claims.

Respondents instead resort to distraction and misdirection. They argue their case does not implicate the relatedness split—but point to legal irrelevancies and severely distort the record. They argue that the California Supreme Court's relatedness test is consistent with this Court's cases—but only at the highest level of generality. And they argue that the Court should await a better vehicle to answer the question presented—but ignore the ongoing, real-world harm being visited upon mass-tort defendants by the decision below. *See* Pharm. Research & Mfrs. of Am. Amicus Br. (PhRMA Br.) 7-10; Prod. Liab. Advisory Council, Inc. Amicus Br. (PLAC Br.) 22-25; GlaxoSmithKline Amicus Br. (GSK Br.) 6-9.

The petition should be granted.

## ARGUMENT

### I. RESPONDENTS' GROUNDS FOR DISTINGUISHING THE SPLIT ARE MERITLESS.

1. As the petition demonstrates, courts have divided into three camps over the degree of causation required to satisfy the "relatedness" prong of the personal jurisdiction test. Pet. 11. Some courts require "but for" causation. *E.g. Menken* v. *Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007). Others require "proximate cause" or foreseeability. *E.g. Harlow* v. *Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005). And still others—including the California Supreme

Court in its decision below—require no causal link at all. *E.g.* Pet. App. 22a.

Respondents do not dispute that well-established split. Nor do they dispute that California has chosen one side of it. *See* Br. in Opp. 11. Instead, they argue that this case does not implicate the split based on two irrelevant facts and one mischaracterization of the record.

The first irrelevancy is respondents' observation that McKesson, a separate defendant, has not challenged personal jurisdiction. Respondents say (at 10) that McKesson's involvement justifies asserting jurisdiction over Bristol-Myers, too. Yet the Court held 36 years ago that "[t]he requirements of *International Shoe* [*Co.* v. *Washington*, 326 U.S. 310 (1945)] * * * must be met as to *each defendant* over whom a state court exercises jurisdiction"; the "assertion of jurisdiction over [one defendant] based solely on the activities of [another defendant] * * * is plainly unconstitutional." *Rush* v. *Savchuk*, 444 U.S. 320, 331-332 (1980). Whether Bristol-Myers is subject to personal-jurisdiction does not change because respondents also sued someone else.

The second irrelevancy is that this suit includes both resident and non-resident plaintiffs. As respondents see it, so long as Bristol-Myers must litigate California plaintiffs' claims, it might as well litigate out-of-state plaintiffs' claims, too. Br. in Opp. 10. But "[t]here is no such thing as supplemental specific personal jurisdiction; if separate claims are pled, specific personal jurisdiction must independently exist for each claim and the existence of personal jurisdiction for one claim will not provide the basis for another claim." 5B Charles Alan

Wright et al., *Federal Practice and Procedure* § 1351 n.30 (3d ed. Apr. 2016 update). Were it otherwise, a State's permissive-joinder rules would be the measure of due process. That illogical result is not the law, and respondents do not cite a single authority suggesting that it is.

And then there is the mischaracterization. Respondents say, notwithstanding the California Supreme Court's acknowledgment to the contrary (Pet. App. 29a), that there *is* a causal connection between Bristol-Myers' California activities and respondents' claims. According to respondents, Bristol-Myers "distributed Plavix to non-residents through McKesson," and Bristol-Myers' "research and development activities in California were related to the claims of the non-residents of flaws in [Bristol-Myers'] drug development practices." Br. in Opp. 13.

Tellingly, no cite follows either of those assertions. That is because they are baseless. Respondents "have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them." Pet. App. 47a-48a (Werdegar, J., dissenting) (emphasis omitted). And it is uncontested that "research and development of Plavix did not take place in California." *Id.* at 5a (majority opinion). Even the California Supreme Court did not rely on these supposed California connections. Respondents have simply invented them from whole cloth.

2. Beyond these false distinctions, respondents offer nothing to resist the inevitable conclusion: any court that requires a causal connection between the defendant's forum activities and the plaintiff's claim

would have dismissed respondents' claims against Bristol-Myers.

The court below admitted as much. Even though "the nonresident plaintiffs' claims would be exactly the same if [Bristol-Myers] had no contact whatsoever with California," Pet. App. 29a, the court thought the requisite connection present because "all the plaintiffs' claims arise out of [Bristol-Myers'] *nationwide* marketing and distribution of Plavix." *Id.* (emphasis added). Respondents repeat this phrase as if it is indicative of a causal connection. Br. in Opp. 12-13. But the California Supreme Court's comment that respondents' claims allegedly arose from Bristol-Myers' "nationwide" conduct does absolutely nothing to prove that they arose from the company's *California* conduct; it simply changes the subject.

Indeed, as the petition noted (at 16-18), essentially the same fact pattern has arisen in courts on the other side of the split, and in each case those courts came out the other way. *See Glater* v. *Eli Lilly & Co.*, 744 F.2d 213, 216 (1st Cir. 1984); *Ratliff* v. *Cooper Labs.*, 444 F.2d 745, 746-748 (4th Cir. 1971). Respondents speculate (at 10) that these courts might have reached different conclusions if those defendants had engaged in "nationwide marketing activities" like Bristol-Myers. But they did. The defendant in *Glater* had "marketed [the drug] nationwide since 1947," 744 F.2d at 214, and the defendant in *Ratliff* had run advertisements "in national medical journals," 444 F.2d at 748. The courts thought that conduct immaterial for a simple reason: the particular plaintiff's claims at issue "did not arise from" the defendant's "contacts with *the forum*."

*Glater*, 744 F.2d at 216 (emphasis added); *see Ratliff*, 444 F.2d at 747. Had the California Supreme Court applied the same standard, it would have dismissed respondents' claims, too.

3. Last, respondents purport (at 11) to show that the Court has often denied similar petitions. Not at all. In both of the California cases respondents' cite, as well as the Second Circuit case, there was no question that the defendants' forum conduct was a but-for cause of the plaintiffs' injuries; the only question was whether the *degree* of causation was sufficient. *See Snowney* v. *Harrah's Entm't, Inc.*, 112 P.3d 28, 44 (Cal. 2005) (claims "premised on alleged omissions during * * * transactions with California residents and in * * * California advertisements"); *Vons Cos., Inc.* v. *Seabest Foods, Inc.*, 926 P.2d 1085, 1099 (Cal. 1996) (injuries occurred "[b]ecause of [a] contractual relationship in California"); *Chew* v. *Dietrich*, 143 F.3d 24, 30 (2d Cir. 1998) (individual "recruited in [the forum state]" for fatal boat race). In *Avocent Huntsville Corp.* v. *Aten International Co.*, 552 F.3d 1324 (Fed. Cir. 2008), the Federal Circuit found personal jurisdiction lacking, making any failure to require but-for causation immaterial. *Id.* at 1326. And in *Domtar, Inc.* v. *Niagara Fire Insurance Co.*, 533 N.W.2d 25 (Minn. 1995), there was no dispute over relatedness at all; that case turned entirely on purposeful availment. *See id* at. 32-33.

The need to resolve this split has grown increasingly pressing in recent years. Five courts of appeals have taken a side in the last decade. *See Beydoun* v. *Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2014); *Oldfield* v. *Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222-1223 (11th Cir.

2009); *Avocent*, 552 F.3d at 1337; *Dudnikov* v. *Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008); *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007). Since *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 920 (2011) and *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 754 n.5 (2014), plaintiffs have attempted ever-more-creative ways of replicating the old "doing business" test under the rubric of specific jurisdiction. Pet. 26, 29. And in California, plaintiffs can now shop suits between the federal courthouse and the state one to select their favored jurisdictional rule. *Compare Menken*, 503 F.3d at 1058, *with* Pet. App. 22a; *see also* GSK Br. 9; Chamber of Commerce Amicus Br. (Chamber Br.) 8-9. The Court should grant the writ and bring clarity and uniformity to this critical area of the law.

## II. RESPONDENTS' ATTEMPT TO WAVE AWAY THE CONFLICT WITH THIS COURT'S CASES FALLS FLAT.

1. Nor can respondents wave away the conflict between the decision below and this Court's cases. Respondents do not contend that they suffered any Plavix-related injuries in California or that the Plavix they ingested was manufactured or sold in California. *See* Pet. 6. Respondents therefore do not contest that their claims do not fit within *Goodyear*'s rule that there is no specific jurisdiction in a product-liability case when the plaintiff's injury did not occur in the forum and the product alleged to have caused the injury was not manufactured or sold there. *See* Pet. 24. And respondents do not disagree that the California Supreme Court's analysis would permit the hypothetical Polish car accident *Daimler*, 134 S.

Ct. at 754 n.5, identified as a "question * * * of general jurisdiction" to proceed in California under a specific-jurisdiction label. *See* Pet. 26-27.

Respondents instead dismiss *Goodyear* and *Daimler*'s statements as "passing dictum." Br. in Opp. 14. But the binding "holding" of a case includes not just its result but also its "rationale." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66-67 (1996). *Goodyear* and *Daimler*'s statements clarified the distinction between general and specific jurisdiction, a distinction that the courts below had "elided." *Goodyear*, 564 U.S. at 926. Indeed, *Goodyear* explicitly stated that the "North Carolina courts lacked specific jurisdiction to adjudicate" the plaintiffs' product-liability claims. *Id.* at 919. If that is not a holding, then not much is.

2. Respondents also argue (at 14) that there is no conflict because the decision below—in their view—adhered to *Goodyear*'s rule that specific jurisdiction is "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." 564 U.S. at 919 (internal quotation marks omitted).

But saying that this Court's cases require a "connection" between the plaintiff's claims and the defendant's forum contacts merely restates the question presented. The question presented is how close the connection must be. *See* Pet. i. As we have demonstrated—and as respondents do not dispute—in every case where the Court has found specific jurisdiction, there has at least been a but-for causal relationship between the plaintiff's claims and the defendant's forum contacts. Pet. 22-23.

Indeed, *Walden* v. *Fiore*, 134 S. Ct. 1115, 1124 (2014) used just those words. It explained that there was specific jurisdiction in California over the defamation defendants in *Calder* v. *Jones*, 465 U.S. 783 (1984) because "the reputational injury caused by the defendants' story would not have occurred *but for* the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens." *Walden*, 134 S. Ct. at 1124 (emphasis added). The California Supreme Court's relatedness test, which does not require a but-for connection (*see* Pet. App. 30a), conflicts with this Court's cases.

3. The closest respondents come to defending the sliding-scale approach is to argue that it is consistent with this Court's disjunctive "aris[ing] out of *or* related to" formulation of the relatedness requirement. Br. in Opp. 14 (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985)). But the Court has explicitly "decline[d] to reach the question[]" of "whether the terms 'arising out of' and 'related to' describe different connections between a cause of action and a defendant's contacts with a forum." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 415 n.10 (1984). And there is no reason to think they do. Opinions are not statutes; every word need not have distinct meaning. *See United States* v. *Skoien*, 614 F.3d 638, 640 (7th Cir. 2010).

Respondents also contend that specific jurisdiction must be boundless because the Court has said that specific jurisdiction has "flourished" in the years since *International Shoe*. Br. in Opp. 16 (quoting *Daimler*, 134 S. Ct. at 758 n.10). And so it has. The

Court has held there can be specific jurisdiction in some circumstances over a manufacturer that sells products into the forum through a distributor, *see J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 884-885 (2011) (plurality opinion), or over a defendant who targets tortious conduct at the forum, even though he never sets foot there, *see Calder*, 465 U.S. at 788-789. But the Court has never reached as far as the decision below did.

4. Finally, respondents cannot ignore the violence that the decision below does to *Daimler*. Respondents block quote the California Supreme Court's assurances that its decision does not necessarily subject Bristol-Myers to jurisdiction on *all* claims in California. Br. in Opp. 16 (citing Pet. App. 35a). But respondents do not deny that the decision below subjects Bristol-Myers to jurisdiction in California on all product-liability claims. *See* Pet. 27-28. The California Supreme Court's expansive notion of specific jurisdiction is practically indistinguishable from general jurisdiction. *See* PLAC Br. 14-17; Chamber Br. 14-15; Wash. Legal Found. Amicus Br. 20-21. It is therefore at odds with this Court's cases.

## III. RESPONDENTS' VEHICLE OBJECTIONS ARE MERITLESS.

1. Respondents are thus left to flyspeck this case's suitability as a vehicle to resolve the question presented. Br. in Opp. 17-20. Those efforts are unavailing.

Respondents claim (at 17) that the Court should await a case that can resolve both whether a causative link is required for relatedness, and, if so, whether a but-for connection is sufficient. But there is nothing that prevents the Court from laying down

a single standard for relatedness on these facts. And not many plaintiffs satisfy the but-for standard but flunk the proximate-cause test, as some courts have recognized in declining to choose between the two. *See* Pet. 12 n.2.

The essential disagreement among the lower courts is whether a causative link is required or not. *See* Pet. 11-16. The many cases arising on similar facts counsel in favor of resolving that dispute immediately. *See* PhRMA Br. 7-10; GSK Br. 6-9. If the Court wishes, it can always proceed incrementally—as it has in other contexts—in fleshing out the precise *degree* of relatedness required. *See Elonis* v. *United States*, 135 S. Ct. 2001, 2013 (2015) ("Such prudence is nothing new.").

2. Respondents also worry that reversing the decision below will have consequences for nationwide class and mass actions. Br. in Opp. 18. But class actions are different than mass actions, and involve different due-process principles. *Cf. Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-814 (1985). And changing current practice in nationwide mass actions is precisely why the Court should grant the writ. Plaintiffs' counsel use California's lenient relatedness rule to shop claims that have no connection to the State, seeking what they believe are juries more likely to return significant verdicts. *See* Pet. 32; PLAC Br. 23-24; Chamber Br. 18-19; GSK Br. 9, 16-17.

Respondents similarly overstate (at 18) the concern that no one court will be able to adjudicate a mass action involving plaintiffs from multiple States. Plaintiffs can all file where the defendant is incorporated or headquartered. *See Daimler*, 134 S. Ct. at

760 (recognizing that these locations afford "at least one clear and certain forum in which a corporate defendant may be sued on any and all claims"). Plaintiffs also may be able to sue in the State in which their product was designed or manufactured, depending on the nature of their claims and the defendant's manufacturing and design processes. *See Goodyear*, 564 U.S. at 919. And in the federal system, in appropriate cases, the multidistrict-litigation device allows cases to be coordinated for pre-trial purposes before being sent back to appropriate forums for trial. *See* PhRMA Br. 13-14. In fact, respondents could have filed in federal court and had their suits coordinated as part of the ongoing multidistrict litigation taking place in New Jersey. *See* Transfer Order, *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.*, No. 2418 (J.P.M.L. Feb. 12, 2013).

3. Respondents end with the curious claim that this case is a poor vehicle because Bristol-Myers conceded below the third, reasonableness prong of specific jurisdiction. Br. in Opp. 18-19. But that makes this case a *cleaner* vehicle: The correctness of the California Supreme Court's decision rests entirely on the relatedness standard this Court will announce.

Respondents' true argument appears to be that notions of predictability and fairness can only be considered as part of specific jurisdiction's reasonableness prong. *See id.* at 19-20. This Court, however, has always crafted jurisdictional rules in light of "the demands of reason and coherence" and "sound judicial policy." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1579 (2016)

(internal quotation marks omitted). Personal jurisdiction is no different. *See, e.g.*, *Daimler*, 134 S. Ct. at 760 (principal place of business and state of incorporation are the paradigm places for general jurisdiction because they "have the virtue of being unique * * * as well as easily ascertainable"); *see also Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) ("Simple jurisdictional rules * * * promote greater predictability.").

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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DECEMBER 2016

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV 10 2016
OFFICE OF THE CLERK

No. 16-466

# In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, et al.,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of California**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, AND AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, and has participated as *amicus curiae* in numerous cases addressing jurisdictional issues.[1]

Many Chamber members conduct business in States other than their State of incorporation and State of principal place of business (the forums in which they are subject to general personal jurisdiction, *see Daimler AG* v. *Bauman*, 134 S. Ct. 746, 760 (2014)). They therefore have a substantial interest in the rules governing the extent to which a State can subject nonresident corporations to specific personal jurisdiction.

The California Chamber of Commerce ("CalChamber") is a nonprofit business association

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties' blanket consents to the filing of amicus curiae briefs are on file with the Clerk.

with over 14,000 members, both individual and corporate, representing virtually every economic interest in the State. For over 125 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues.

Founded in 1986, American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus* briefs in cases that have addressed important liability issues.

Subjecting corporations to specific jurisdiction for claims that have nothing to do with the forum State would eviscerate the due process limits on personal jurisdiction recognized by this Court in numerous cases dating back to *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945)—and could well expose corporations that do business nationwide to what amounts to general personal jurisdiction in all fifty States.

*Amici* file this brief to explain that this Court's review of the holding below is warranted because that result is irreconcilable with this Court's precedents and would impose unfair burdens on businesses, permit forum-shopping that undermines the in-

tegrity of the judicial system, and contradict the principles of American federalism.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions nearly three years ago in *Daimler* and in *Walden* v. *Fiore*, 134 S. Ct. 1115 (2014), have produced a large number of lower court decisions addressing the due process limits on personal jurisdiction—and reaching conflicting results. Some of these conflicts stem from disagreements about the meaning of *Daimler* and *Walden*, and some involve the deepening, and increased importance, of pre-*Daimler*/*Walden* disagreements. At least four certiorari petitions presenting substantial questions regarding personal jurisdiction (in addition to the present case) are now pending before the Court.[2]

Clarity regarding the due process standards governing personal jurisdiction is essential. These issues arise in virtually every case that is not filed in the defendant's place of incorporation or principal place of business—and that set of cases represents a very substantial percentage of the litigation involving corporations. Uncertainty regarding the applicable legal rules inflicts needless litigation expense, promotes forum shopping, and violates important federalism principles by permitting one State to intrude on the sovereignty of other States.

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[2] *Koninklijke Philips, N.V.* v. *Washington*, No. 16-559 (petition for certiorari filed Oct. 19, 2016); *Cornerstone Healthcare Group Holding, Inc.* v. *Nautic Management VI, L.P.*, No. 16-522 (petition for certiorari filed Oct. 17, 2016); *T.V. Azteca S.A.B. de C.V.* v. *Ruiz*, No., 16-481 (petition for certiorari filed Oct. 7, 2016); *BNSF Railway Co.* v. *Tyrrell*, No. 16-405 (petition for certiorari filed Sept. 28, 2016).

*Amici* submit that this Court's review is warranted with respect to a number of the issues on which the lower courts are in conflict. In this brief, we describe the different categories of questions presented in the pending petitions, and explain why this case—because it implicates several issues on which the lower courts disagree—provides the Court with an exceptional opportunity to clarify this important area of the law.

This Court in *Daimler*:

- Distinguished between "specific jurisdiction," in which a court may exercise "[a]djudicatory authority" because "the suit arises out of or relates to the defendant's contacts with the forum;'" and "general jurisdiction," in which the "corporation's continuous corporate operations within a state are so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 134 S. Ct. at 754 (internal quotation marks and brackets omitted).
- Recognized that "[a]s this Court has increasingly trained on the relationship among the defendant, the forum, and the litigation, *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme." *Id.* at 758 (internal quotation marks, citation, and footnote omitted).
- Held that general jurisdiction is available only where a "corporation's 'affiliations with the State are so "continuous and systematic" as to render it "essentially at home in the forum

> State," which—absent unusual circumstances—restricts general jurisdiction to a corporation's State of incorporation and State of principal place of business. *Id.* at 761 (internal quotation marks omitted).

*Walden* emphasized that the specific jurisdiction inquiry "focuses on the relationship among the defendant, the forum, and the litigation"; "[f]or a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." 134 S. Ct. at 1121 (internal quotation marks omitted).

In the wake of *Daimler* and *Walden*, lower courts are confronting three basic sets of issues. *First*, they face contentions that, notwithstanding *Daimler*'s holding, general jurisdiction is available in a State that is not the corporation's place of incorporation or principal place of business. *BNSF Railway Co.* v. *Tyrrell*, No. 16-405, in which some of the *amici* here filed an *amicus curiae* brief urging summary reversal, is an example of this phenomenon.

*Second*, lower courts are addressing the standard governing specific jurisdiction, because, as *Daimler* recognized, that is now the basis for personal jurisdiction in most cases—which is even more the case in light of the Court's holding in *Daimler*. The lower courts are reaching conflicting conclusions on, for example, the proper application of the "stream of commerce" and "effects" tests. These issues are presented in *Koninklijke Philips N.V.* v. *Washington*, No. 16-559, and *TV Azteca, S.A.B. de C.V.* v. *Ruiz*, No. 16-481, in which some of the *amici* here plan to file an *amicus curiae* brief urging the Court to grant review.

*Third*, lower court cases address the distinction between general and specific jurisdiction—in particular the standard for determining when a contact between the forum and the defendant qualifies as "related" to the suit and therefore may be considered in assessing the permissibility of specific jurisdiction. This case presents the lower courts' conflict on that question.

This Court has expressly admonished lower courts not to "elide[] the essential difference between case-specific and all-purpose (general) jurisdiction." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 927 (2011). But that is exactly what the majority below did, by inventing a "sliding scale approach to specific jurisdiction," under which "the more wide ranging the defendant's forum contacts, the more readily" the court presumes a "connection between the forum contacts and the claim"—even when in fact there is no such connection. Pet. App. 32a.

The California court's "sliding scale approach" subjects petitioner to the practical equivalent of general jurisdiction in California for every claim involving the drug Plavix—even claims by individuals who did not ingest or purchase the drug in California and are not California residents—simply because the same drug was also purchased by *other* individuals claiming injury in California. Applying the "specific jurisdiction" label to uphold what is in fact general jurisdiction, so as to circumvent this Court's limits on general jurisdiction, is directly contrary to this Court's precedents and will have disastrous consequences for nationwide businesses and for the judicial system.

This Court's decisions regarding the scope of specific jurisdiction—from *International Shoe* up to the present—consistently recognize that the plaintiff's claims must relate *directly* to the defendant's contacts with the forum State. That is so because, as this Court explained in *Goodyear*, specific jurisdiction is proper only to the extent that a case involves "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919 (brackets and internal quotation marks omitted). Where a claim does not in any way arise out of the defendant's contacts with the forum State, there is no basis for regulation by the State and specific jurisdiction is unavailable.

The majority below held that California could exercise specific jurisdiction over out-of-State plaintiffs' claims, despite the lack of a connection between those claims and petitioner's California contacts (principally, distributing and marketing the drug in California), because petitioner allegedly engaged in similar sales and marketing activity in other States.

But that holding means that a product manufacturer is subject in practical terms to general jurisdiction for any product-related claims in *every* State where its products are sold. Such a result would be flatly inconsistent with *Daimler*, which held that general jurisdiction should only be found in a corporation's State of incorporation and principal place of business, except in a truly "exceptional case." 134 S. Ct. at 761 n.19.

It would also impose new and unwarranted burdens on nationwide businesses, the courts, and the American federal system. Businesses that sell products in a large number of States would have no ability to predict where, and to what extent, they might

be haled into court on product-related claims: any plaintiff could bring a claim in any forum where the defendant's product was sold. Certain courts perceived to be plaintiff-friendly would be overwhelmed as plaintiffs' lawyers concentrated as many product-related lawsuits in those courts as possible. And States would be newly empowered to regulate conduct that occurred entirely outside their borders—contrary to the principles of federalism, which hold that each State's regulatory authority is confined to in-State matters.

The harmful consequences that are sure to follow from the decision below are ample evidence that this issue merits this Court's attention. And the clear conflict between the decision below and this Court's precedents leaves no doubt that the decision below should be reversed.

Moreover, because this case involves general jurisdiction, specific jurisdiction, and the relationship between the two, it provides an exceptional opportunity for this Court to clarify this important area of law. As the dissenting justices below noted, the theory adopted by the California court majority finds no support in this Court's jurisprudence and threatens to undo, through an expansion of specific jurisdiction, the limits set by this Court on general jurisdiction. Review is therefore clearly warranted.

## ARGUMENT

### I. The "Sliding Scale" Standard For Specific Jurisdiction Violates Due Process.

#### A. This Court's Precedents Establish That The Plaintiff's Claim Must Directly Relate To The Defendant's Forum Contacts To Permit Specific Jurisdiction.

Just two years ago, this Court reaffirmed that in order for an exercise of specific jurisdiction to comport with due process, "the defendant's *suit-related* conduct must create a *substantial connection* with the forum State." *Walden*, 134 S. Ct. at 1121 (emphasis added). This requirement encapsulates the essence of specific jurisdiction: Unlike general jurisdiction, specific jurisdiction must be based on forum contacts *that give rise to the plaintiff's suit.*

*Walden* was not the first decision of this Court to acknowledge that principle. To the contrary, the Court articulated it for the first time more than seventy years ago in *International Shoe*, which defined the approach to specific jurisdiction that is still used today. Explaining why specific jurisdiction comports with due process, this Court observed that when "a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state." 326 U.S. at 319. "The exercise of that privilege," the Court reasoned, "may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *Ibid.* (emphasis added).

The Court went on to conclude that Washington's exercise of specific jurisdiction over the defendant was permissible because the defendant had engaged in activities within the State and "[t]he obligation which is here sued upon arose out of ***those very activities***," making it "reasonable and just * * * to permit the state to enforce ***the obligations which [the defendant] ha[d] incurred there***." *Id.* at 320 (emphasis added).

The *International Shoe* framework thus rests on the principle that, when a defendant engages in activity in the forum State, due process permits it to be haled into court there on a specific jurisdiction theory only with respect to claims that arise out of "the very activities" that the defendant engaged in, or that enforce the "obligations" that the defendant incurred in the State. That principle necessarily bars the invocation of specific jurisdiction with respect to claims that do ***not*** arise out of in-State activities or obligations.

This Court has repeatedly recognized that precise limitation on specific jurisdiction. In *J. McIntyre Machinery, Ltd.* v. *Nicastro*, for example, the plurality opinion contrasted specific jurisdiction with general jurisdiction, which allows a State "to resolve both matters that originate within the State and those based on activities and events elsewhere." 564 U.S. 873, 881 (2011) (plurality opinion). Specific jurisdiction, the plurality explained, involves a "more limited form of submission to a State's authority," whereby the defendant subjects itself "to the judicial power of an otherwise foreign sovereign ***to the extent that power is exercised in connection with the defendant's activities touching on the State.***" *Ibid.* (emphasis added).

Then, in *Goodyear*, the Court explained that specific jurisdiction "depends on an affiliation between the forum and the underlying controversy, principally, ***activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation***." *Goodyear*, 564 U.S. at 919 (emphasis added; brackets and internal quotation marks omitted). Thus, specific jurisdiction exists only where a defendant engages in continuous activity in the state "and *that activity gave rise to the episode-in-suit*," *id.* at 923, or where the defendant commits "'single or occasional acts' in a State [that are] sufficient to render [it] answerable in that State with respect to those acts, ***though not with respect to matters unrelated to the forum connections.***" *Id.* (emphasis added) (quoting *Int'l Shoe*, 326 U.S. at 318).

Finally, in *Daimler*, the Court reaffirmed that specific jurisdiction is available only where the defendant's in-State activities "g[i]ve rise to the liabilities sued on," or where the suit "relat[es] to that in-state activity." *Daimler*, 134 S. Ct. at 754 (internal quotation marks omitted).

In short, the Court has repeatedly underscored that specific jurisdiction is available ***only*** for claims that directly relate to a defendant's in-State activities. A State cannot exercise specific jurisdiction with respect to claims that do not directly relate to a defendant's forum contacts.

### B. The "Sliding Scale" Approach Conflicts Extends State Regulatory Authority Beyond The Bounds Permitted by the Constitution.

The California court's "sliding-scale" approach—under which "the more wide ranging the defendant's forum contacts, the more readily" the court presumes a "connection between the forum contacts and the claim," even when in fact there is no such connection, Pet. App. 32a—is squarely contrary to this Court's teachings on specific jurisdiction. It allows a defendant to be haled into court on a "specific jurisdiction" theory even when the plaintiff's claims lack any direct relation to the defendant's forum contacts—thereby transforming specific jurisdiction into something far more akin to general jurisdiction.

The court below did not contend that the claims of out-of-State plaintiffs arose out of or directly resulted from petitioner's conduct in California—on the contrary, it freely acknowledged under its approach, that issue was irrelevant because a plaintiff's claim "need not arise directly from the defendant's forum contacts" or be causally linked to those contacts in any way. Pet. App. 22a. Instead, the court held that it was sufficient that the in-State and out-of-State plaintiffs' claims were "based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product" as part of a "common nationwide course of distribution." *Id.* at 28a.

That holding cannot be squared with cases like *Goodyear*, which make clear that specific jurisdiction may be exercised only with respect to "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Good-*

*year*, 564 U.S. at 919 (brackets and internal quotation marks omitted). The out-of-State plaintiffs here do not allege that they were injured by petitioner's drug in California; that the drug was designed or developed in California; or that they saw any marketing or advertising for the drug in California. Indeed, *every* operative event underlying their claims took place outside the State. Thus, none of petitioner's "suit-related conduct" with respect to these claims had *any* connection to California, let alone a "substantial connection." See *Walden*, 134 S. Ct. at 1121; see also *Glater* v. *Eli Lilly & Co.*, 744 F.2d 213, 216 (1st Cir. 1984) (holding that defendant's sales of a drug in New Hampshire could not "be said to be related to [plaintiff's] injury" in Massachusetts for specific-jurisdiction purposes).

It is no answer to say, as the court below did, that petitioner's alleged "common nationwide" course of conduct supplies the missing "substantial connection" between California and the out-of-State plaintiffs' claims. The court below focused on the fact that in light of petitioner's California activities, it was "not unfair" for petitioner to be haled into court there. Pet. App. 30a (internal quotation marks omitted); see also *id.* at 22a (stating that the "ultimate question under the due process clause" is "whether the exercise of jurisdiction in the forum is fair"). But "fairness" in broad terms is only one aspect of the specific jurisdiction test; specific jurisdiction also requires minimum contacts between the defendant and the forum that are "suit-related." *Walden*, 134 S. Ct. at 1121. That minimum-contacts requirement cannot be met by pointing to contacts that did not give rise to the plaintiff's claims.

At most, what the court's analysis suggested was that petitioner's alleged in-State conduct paralleled its alleged conduct in other States. But nothing in this Court's precedents suggests that mere parallelism between a defendant's in-State conduct and the conduct that allegedly caused an out-of-State injury is enough to create specific jurisdiction over the out-of-State claim.

If it did, then California could point to the fact that a product is sold in California as a basis for regulating the labeling of the same product when it is sold in other States—on the theory that the defendant's "common nationwide" labeling permits that result. Due process precludes such an expansive assertion of state power.

Indeed, the idea of basing specific jurisdiction on this kind of parallelism clearly conflicts with this Court's decision in *Daimler*. In *Daimler*, this Court held that corporations should ordinarily be subject to general, all-purpose jurisdiction *only* in the "paradigm" forums of their State of incorporation and principal place of business. *Daimler*, 134 S. Ct. at 760 (quoting *Goodyear*, 564 U.S. at 924). Indeed, the Court stated that general jurisdiction would exist outside those forums only "in an exceptional case." *Id.* at 761 n.19. *Daimler* imposed this restriction out of recognition that "[a] corporation that operates in many places can scarcely be deemed at home in all of them" (134 S. Ct. at 762 n.20), and that specific jurisdiction has become the "centerpiece of modern jurisdiction theory, while general jurisdiction has played a reduced role." *Id.* at 755 (brackets and internal quotation marks omitted).

But under the sliding-scale approach used here, product manufacturers would effectively be subject

to general jurisdiction in every State in which they sell their products. Any plaintiff who purchased the product could bring suit in any State where the product was sold, simply by alleging that the manufacturer engaged in a "common nationwide course of distribution."

And while this case involves both in-State and out-of-State plaintiffs, nothing in the approach used by the court below requires there to be any in-State plaintiffs at all, as long as the defendant has engaged in conduct in the State that is similar to the out-of-State conduct that allegedly caused an out-of-State injury. That would "reintroduce general jurisdiction by another name," on a massive scale—undermining *Daimler*'s cabined framework for general jurisdiction. See Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 687 (2015); see also Pet. App. 50a-51a (Werdegar, J., dissenting) ("What the federal high court wrought in *Daimler* * * * this court undoes today under the rubric of specific jurisdiction.").[3]

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[3] And as the First Circuit noted in rejecting the specific-jurisdiction approach adopted by the court below, it would also "amount to retributive jurisdiction"—in that defendants would be held liable for out-of-State injuries without having committed any in-State acts to subject themselves to specific jurisdiction for those injuries. *Glater*, 744 F.2d at 216 n.4.

## II. Exercising Specific Jurisdiction Over Claims That Do Not Directly Relate To A Defendant's Forum Contacts Harms Businesses, Courts, And The Federal System.

Decisions such as the ruling below not only violate settled due process principles—they inflict severe burdens on the business community, the courts, and the federal system. These burdens demonstrate the compelling need for this Court's intervention.

### A. Sliding-Scale Approaches To Jurisdiction Impose Greater Uncertainty On Businesses.

This Court has long recognized that the limitations on specific jurisdiction "give[] a degree of predictability to the legal system that allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). Companies know that they generally have a "due process right not to be subjected to judgment in [the] courts" of a State other than their home State, or States, unless they have affirmatively established contacts with the State itself that make them subject to specific jurisdiction there. *Nicastro*, 564 U.S. at 881; *see also Walden*, 134 S. Ct. at 1123.

This "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). For example, "[i]f a business entity chooses to enter a state on a minimal level, it knows that under the relationship standard, its potential for suit will be limited to suits concerning the activities that it initiates in the state." Carol Rice Andrews, *The Personal Jurisdic-*

*tion Problem Overlooked in the National Debate About "Class Action Fairness"*, 58 S.M.U. L. Rev. 1313, 1346 (2005).

Extending specific jurisdiction to claims that do not arise out of a defendant's forum contacts eliminates any predictability. If plaintiffs could bring claims from all over the country in any State as long as they allege a "common nationwide course of distribution," Pet. App. 28a, businesses' ability to predict where they are subject to specific jurisdiction—and tailor their conduct to limit exposure to jurisdiction—would be drastically reduced, because a "company's potential liabilities [could not] be forecast from its [in-]state activities." *Id.* at 83a (Werdegar, J., dissenting). Indeed, a company that sold products nationwide would have no way of avoiding being trapped in mass actions, comprised principally of cases involving only out-of-State conduct, in any forum in the country—no matter how "distant or inconvenient." *See World-Wide Volkswagen*, 444 U.S. at 292.

Applying specific jurisdiction in such an unpredictable and indiscriminate manner would be unfair to product manufacturers and irreconcilable with the Due Process Clause. *See Nicastro*, 564 U.S. at 885 (explaining that "[j]urisdictional rules should avoid the[] costs [of unpredictability] whenever possible"); *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 n.17 (1985) (explaining that due process is violated when a defendant "has had no 'clear notice that it is subject to suit' in the forum and thus no opportunity to 'alleviate the risk of burdensome litigation' there" (quoting *World-Wide Volkswagen*, 444 U.S. at 297)). And the increase in legal costs produced by this un-

bridled approach to specific jurisdiction would ultimately be borne by consumers.

### B. Sliding-Scale Approaches Expand Plaintiffs' Ability To Engage In Forum-Shopping.

The California court's sliding-scale approach also would impose new burdens on courts, by enabling plaintiffs—and plaintiffs' lawyers—to shop aggressively for plaintiff-friendly forums and bring as many claims as possible there. In pharmaceutical litigation, plaintiffs' counsel often seek to aggregate claims from plaintiffs across the country in particular "magnet jurisdictions" that are viewed as especially plaintiff-friendly. Before *Daimler*, plaintiffs seeking to bring suit in such "magnet jurisdictions" would rely on expansive theories of general jurisdiction, arguing that the defendant companies did a high volume of business there.

*Daimler* foreclosed that approach by holding that even a "substantial, continuous, and systematic course of business" by the defendant is not enough to support general jurisdiction. 134 S. Ct. at 761 (internal quotation marks omitted). But the standard applied by the majority below circumvents *Daimler* and opens a new forum-shopping avenue for plaintiffs' lawyers, allowing the filing of a limitless number of claims in a desired forum as long as there is some nebulous relation between the claims and the defendant's forum contacts. See Charles W. Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 242 (2014) (rejecting the notion that of "specific jurisdiction in every forum in which the defendant conducts continuous and systematic forum activities that are sufficiently similar to the occurrence in dis-

pute," which "would give the plaintiff the choice of essentially every state for proceeding against a national corporation"). This Court should not permit such blatant gamesmanship.

### C. Sliding-Scale Approaches Are Inconsistent With Federalism.

Finally, the sliding-scale approach violates basic principles of federalism. As this Court has recognized, the minimum-contacts requirement for exercising specific jurisdiction "acts to ensure that the States[,] through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. By expanding the scope of a State's authority to exercise specific jurisdiction beyond permissible bounds, the sliding-scale theory "infringe[s] directly on [other states'] sovereign prerogative to determine what liabilities [defendants] should bear for actions in [their] borders." Pet. App. 83a (Werdegar, J., dissenting).

States have no legitimate interest in asserting specific jurisdiction so expansively and meddling in affairs that occurred exclusively in other States. Rather, the ability to adjudicate claims based on a defendant's in-State activities is amply sufficient to vindicate a State's interest in protecting its citizens and regulating conduct within its borders. Thus, the dissenters below rightly concluded that "[w]here the conduct sued upon did not occur in California, was not directed at individuals or entities in California, and caused no injuries in California or to California residents, neither our state's interest in regulating conduct within its borders nor its interest in providing a forum for its residents to seek redress for their

injuries is implicated." *Id.* at 86a (dissent) (citations omitted).

This Court should reject the sliding-scale approach used below and require plaintiffs to bring their claims in the proper forum—the State in which their claims arose or a State in which the defendant is subject to general jurisdiction.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2016

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Supreme Court, U.S.
FILED
NOV 10 2016
OFFICE OF THE CLERK

No. 16-466

In the

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

PETITIONER,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

RESPONDENTS.

**On Petition for a Writ of Certiorari to the California Supreme Court**

## BRIEF OF *AMICUS CURIAE* GLAXOSMITHKLINE, LLC IN SUPPORT OF PETITIONER

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November 10, 2016

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* GlaxoSmithKline, LLC ("GSK") is a pharmaceutical company that researches and develops vaccines, medicines, and consumer healthcare products. GSK is a Delaware limited liability company. Its sole member is GlaxoSmithKline Holdings (Americas) Inc., a Delaware corporation with its principal place of business in Delaware. *See Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 341 (3d Cir. 2013).

Like petitioner Bristol-Myers Squibb Company, GSK often faces mass tort lawsuits related to its products. In those suits, plaintiffs' attorneys begin by selecting a forum that they believe will be favorable, regardless of where their clients reside or where their clients were prescribed the medication that forms the basis of the suit. The attorneys then aggregate dozens or even hundreds of plaintiffs, most of whom have no connection with the chosen forum, to bring claims that also are untethered from the forum. As a result, GSK is forced to defend cases in states where it has no presence and where key witnesses are often unavailable to testify in person at trial.

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[1] Petitioner and respondents have filed blanket consent letters with the Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* and its counsel contributed monetarily to the preparation or submission of this brief. The parties were given timely notice of GSK's intent to file this brief.

GSK supports this petition because it presents an important, recurring question about the Court's due process jurisprudence as it relates to personal jurisdiction. The Court's precedents recognize that, absent "constant and pervasive" ties to a forum that render the defendant "at home" there, a court may exercise jurisdiction over the person of a defendant only when the claim itself is tied to the forum. California's "sliding-scale" approach to this fundamental question of a court's power guts important due process protections and renders defendants like GSK vulnerable to the most brazen and harmful kind of forum shopping.

This case offers a clean vehicle for addressing the entrenched split among the lower courts regarding the proper standard for determining whether a court may exercise specific personal jurisdiction over a defendant when the selected forum has no connection to the events underlying a plaintiff's claim.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the California Supreme Court effectively resurrected the theory of personal jurisdiction that this Court laid to rest just two years ago.

In *Daimler AG v. Bauman*, the Court held that a corporation is subject to general jurisdiction only where it is "at home," which typically means "where it is incorporated or has its principal place of business." 134 S. Ct. 746, 751, 760 (2014). *Daimler* reined in the "exorbitant exercises of all-purpose jurisdiction" — based merely on a corporation's

"continuous and systematic" contacts — that some prior case law had permitted. *Id.* at 761.

In a concession to reality, the California Supreme Court acknowledged that BMS is not "at home" in California and therefore not subject to general jurisdiction there. But the majority then emptied that holding of all its significance. Invoking the same "continuous and systematic" contacts that are concededly not enough for *general* jurisdiction, the majority found them sufficient for *specific* jurisdiction. It did so by loosening the "arising from" requirement — which is supposed to distinguish specific from general jurisdiction — until specific jurisdiction is no longer specific to the plaintiff's claim at issue and is really general jurisdiction by another name.

Under the decision below, a company with nationwide operations is subject to "specific" jurisdiction on virtually any claim, virtually anywhere. But there is something obviously wrong with a theory of "specific" jurisdiction that permits jurisdiction in any state in the nation even where the harm only occurs in a state outside the forum. As the three-justice dissent observed, "[w]hat the federal high court wrought in *Daimler* — a shift in the general jurisdiction standard from the 'continuous and systematic' test of *Helicopteros* to a much tighter 'at home' limit — this court undoes today under the rubric of specific jurisdiction." Pet. App. 50a–51a (Werdegar, J., dissenting).

The decision below cries out for review on both practical and doctrinal grounds. As a practical matter, the decision below will serve as an open

invitation for plaintiffs' lawyers to concentrate mass tort actions in the California courts. GSK is already facing several such suits in Los Angeles Superior Court, where plaintiffs' lawyers have used some California resident plaintiffs as the key to unlock the courthouse doors for dozens of non-California plaintiffs. The trial court has already followed the decision below and denied GSK's motion to quash for lack of personal jurisdiction.

Similar mass tort actions involving out-of-state plaintiffs who claim out-of-state injuries are pending in other jurisdictions favored by plaintiffs' lawyers, such as Missouri and Illinois. These jurisdictions are attractive to plaintiffs because of perceived favorable jurisdictional and discovery rulings, because of juries that plaintiffs' lawyers believe are more likely to award large verdicts, and because aggregating large numbers of plaintiffs makes it difficult if not impossible for defendants to defend.

Taking such a loose approach to specific jurisdiction in a mass tort action like this one exacerbates the threat to defendants' due process rights. As this Court has explained, "exorbitant" exercises of personal jurisdiction "are barred by due process constraints on the assertion of adjudicatory authority." *Daimler*, 134 S. Ct. at 751. When a state court reaches out to decide a dispute that arose in a different state, the defendant will have trouble assembling the witnesses necessary to defend. State courts generally lack subpoena power outside the state's borders, making it difficult for defendants to obtain live testimony from critical witnesses like the prescribing physician. Without the ability to compel

these witnesses to testify at trial, the defendant's attorneys will often take an out-of-state deposition that doubles as both a discovery and a cross-examination deposition, and then try to splice together a video to present at trial. The result is an awkward presentation that lacks the force of a live cross-examination and that bears little resemblance to "the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence." *Watkins v. Sowders*, 449 U.S. 341, 349 (1981).

The California Supreme Court's decision is also contrary to basic principles of federalism. A state lacks the constitutional authority to declare itself the hub of a nationwide multi-district litigation, reaching out to decide controversies that properly belong in other states. Nor should a state require its citizens to serve as jurors — in trials that can last weeks — to adjudicate disputes that lack any meaningful connection to the state.

What is more, the decision below complicates mass tort litigation by making difficult choice-of-law issues more likely to arise. When the plaintiff, the defendant, and the injury are all out of state, a court must decide whether to apply the substantive law of the state where the claim arose (often but not necessarily the plaintiff's home state) or the substantive law of the forum state. These issues make dispositive-motion practice and the development of jury instructions more convoluted, creating more opportunities for reversible error.

The decision below is an ideal vehicle for the Court to put an end to this inappropriate forum

shopping. This fact pattern arises frequently, and this case would have been decided differently in jurisdictions that employ a more rigorous "arising from" requirement. Although other pending petitions pose other questions about personal jurisdiction, none is likely to resolve the question presented here.

## ARGUMENT

### I. The Court Should Grant BMS's Petition.

#### A. The Question Presented Has Great Practical Importance.

BMS is not alone in facing mass tort litigation brought by out-of-state plaintiffs who ingested the drug at issue out of state and claim out-of-state injuries. Such plaintiffs routinely target GSK as well. GSK is a defendant in mass tort suits around the country where out-of-state plaintiffs use in-state plaintiffs as an anchor to select what their attorneys perceive to be favorable jurisdictions.

Like BMS, GSK is facing many of those suits in California, where GSK is not "at home" under *Daimler*. Over the last three years, plaintiffs' attorneys filed thirteen lawsuits in California state courts, which have been assembled in a coordinated proceeding in Los Angeles County Superior Court. The plaintiffs in these cases are mother-child pairs who allege that the unborn children were injured when their mothers ingested Paxil, a drug that is effective in treating depression, obsessive-compulsive disorder, and anxiety.

The thirteen complaints name twenty-seven California residents and thirty-one non-California

residents as plaintiffs. The non-California plaintiffs live in states all over the country, including Illinois, Pennsylvania, Kentucky, New Hampshire, Oklahoma, Michigan, Missouri, Arizona, Wisconsin, Wyoming, Louisiana, Texas, and Mississippi. They do not allege that their physicians prescribed Paxil in California, that the plaintiffs ingested Paxil in California, or any other facts linking their claims to California. Like the *BMS* plaintiffs, the complaints tether personal jurisdiction solely to the fact that GSK marketed and sold Paxil in California as a general matter — in-state sales that potentially give rise to claims by *other* plaintiffs, but not the claims of the out-of-state plaintiffs. The trial court has already invoked the California Supreme Court's decision and denied GSK's motion to quash for lack of personal jurisdiction. *See* Order Denying Defendant GlaxoSmithKline, LLC's Motion to Quash for Lack of Personal Jurisdiction of Non-California Plaintiffs, *Paxil II Product Liability Cases*, JCCP 4786 (Nov. 4, 2016). If left uncorrected, the decision below approving this tactic will further encourage plaintiffs' lawyers to concentrate nationwide mass actions in California.

Similar suits involving Paxil are also proceeding in Missouri and Illinois, both favored jurisdictions for plaintiffs' lawyers. In Missouri, ninety-six plaintiffs from over thirty different states joined with three from Missouri to sue GSK in St. Louis. *See Fitts et al. v. GSK*, Cause No. 1622-CC00539 (Mo. Cir. Ct.). In a previous matter in St. Louis, sixty-one non-Missouri plaintiffs combined their claims with those of four Missouri residents. *See Orrick v. GSK*, Cause No. 1322-CC00079-01 (Mo. Cir. Ct.). The court in

*Fitts* upheld personal jurisdiction as to the out-of-state plaintiffs' claims on the rationale that the *plaintiffs* had "consented to personal jurisdiction" and GSK's agent had been served in Missouri – skipping entirely over the question whether the nexus required by due process existed between the out-of-state plaintiffs' claims and GSK's Missouri contacts. *Fitts*, Order at 2-3 (Nov. 9, 2016).

Illinois is another example. There, six mother-child pairs from Florida, Colorado, Virginia, Michigan, and Wisconsin used one pair from Illinois as an anchor to sue GSK in the Circuit Court of Cook County. *See Meyers et al. v. GlaxoSmithKline, LLC*, 2016 IL App (1st) 151909, *pet. for leave to appeal filed* Sep. 30, 2016. In a twist on the theory endorsed by the court below, the out-of-state plaintiffs alleged that their claims arose out of GSK's clinical trial program for Paxil. That program had only the slightest of connections to Illinois: ninety-five percent of the over 300 trials did not have even a single study site or investigator in Illinois, and even the few trials that had a site in Illinois had the vast majority of their sites elsewhere. Although the plaintiffs did not allege that their claims had anything to do with the minuscule portion of the clinical trial program that occurred in Illinois, the trial court and the Illinois Appellate Court thought it was enough that the data from the handful of Illinois study sites — in the handful of trials that had even one Illinois site — was "aggregated" with the data GSK collected nationally and internationally. 2016 IL App (1st) 151909, at ¶ 52. Under that inappropriately relaxed approach to the "arising from" requirement, GSK would be subject to specific

jurisdiction essentially everywhere on essentially any claim.

Plaintiffs pick what their lawyers refer to as these "favorable jurisdictions" for a reason. William Cash, *Is It Time to Rethink the MDL for Mass Tort Cases?* The Trial Lawyer Magazine (Sept. 2015). Plaintiffs' lawyers believe that they can obtain favorable discovery and evidentiary rulings in these courts. And they consider the jury pools to be optimal. "It is certainly fair to summarize all of this by saying that juries in California put a higher value on personal injury cases than the average American does." Ronald V. Miller, Jr., "Average Injury Verdicts in California," Accident Injury Lawyer Blog (Dec. 15, 2010), *available at* http://www.accidentinjurylawyerblog.com/2010/12/average_injury_verdicts_in_cal.html.

As another plaintiffs' lawyer explained, "What I call the 'magic jurisdiction' [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges . . . and it's almost impossible to get a fair trial if you're a defendant in some of these places. . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is." Richard "Dickie" Scruggs, Asbestos for Lunch, panel discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in INDUSTRY COMMENTARY (Prudential Securities, Inc., New York), June 11, 2002, at 5.

### B. The Decision Below Violates Due Process and is Contrary to Principles of Federalism.

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). These constitutional limits "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum." *Id.* at 292.

The decision below disregards these principles and imposes constitutionally problematic burdens on defendants. Most notably, it is difficult for defendants to obtain live trial testimony from out-of-state witnesses, such as the plaintiff's doctors, family, friends, and co-workers. This problem is particularly acute when it comes to the prescribing physician, who is typically one of the most important witnesses. That doctor will testify about why she prescribed the drug, whether a different warning would have changed her treatment recommendation, and what the drug was intended to treat. Under the learned intermediary doctrine, moreover, a manufacturer fulfills its duty to warn by advising the prescribing physician of the risks, meaning that the physician's testimony can be crucial. *See, e.g., Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966); *Hansen v. Baxter Healthcare Corp.*, 764 N.E.2d 35, 42 (Ill. 2002) (manufacturers of prescription drugs need not warn patients directly, but must "warn prescribing physicians . . . of the product's known dangerous propensities").

But getting the doctor's testimony is a tricky endeavor. Doctors generally do not jump at the opportunity to testify, particularly in jurisdictions far from home. And they cannot be compelled to do so, because state courts do not have the power to compel out-of-state witnesses to attend trial. *See, e.g.*, *Gridley v. State Farm Mut. Ins. Co.*, 840 N.E.2d 269, 279 (Ill. 2005) ("Illinois courts do not have subpoena power in Louisiana, so . . . State Farm would not be able to compel the attendance of the Louisiana witnesses in Illinois.").

In practice, then, the defendant will depose the doctor in her home state. To do so, the defendant often must ask the court in the plaintiff's chosen forum to authorize the taking of the foreign deposition. *See, e.g.*, Commission to Take Deposition Outside California, http://www.courts.ca.gov/documents/disc030.pdf. Then, the defendant often hires a local lawyer in the physician's state and files a separate lawsuit in a local court in order to obtain the foreign jurisdiction's authorization to take the deposition.

At the deposition, the defendant faces a strategic dilemma. The defendant cannot compel the doctor to appear at trial, so the deposition video may be the only way to present the doctor's testimony to the jury. But the defendant's attorney has not spoken with the doctor, because most states do not allow *ex parte* discussions by defense counsel with a plaintiff's doctor. As a result, the defendant does not know what the doctor is going to say.

So the defendant has two unpalatable choices. It can combine a discovery and a cross-examination

deposition into one, requiring defense counsel to artfully begin with open-ended questions and to close them off with cross-examination questions developed on the spot. Then, the defendant can edit and splice together the deposition clips, inevitably resulting in a disjointed and awkward presentation. Or the defendant can try to depose the doctor twice, if the defendant can persuade the forum state's court and the local court to allow it (a difficult thing to do).

In either event, the jury is deprived of the benefit of live testimony. And the defendant is denied the opportunity to prepare and deliver an effective cross-examination — "[t]he age-old tool for ferreting out truth in the trial process." *Perry v. Leeke*, 488 U.S. 272, 283 (1989). Instead, the judge turns down the lights, the screen comes on, and the jurors begin nodding off. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to the court, jury or most litigants."). In an effort to liven things up, two attorneys will sometimes role-play by reading the deposition transcript aloud. But that artificial solution does not solve the problem, because the jury still cannot view the witness's demeanor. Moreover, without witnesses actually present, the defendant cannot ask them questions tailored to what has occurred at trial.

An example from the *Orrick* case in Missouri (*see supra* at 8) illustrates this problem. As explained, that case involved a large number of out-of-state plaintiffs who used a handful of Missouri plaintiffs as

an anchor. The first claim set for trial involved a plaintiff from West Virginia, and the plaintiff's mother's testimony about other drugs she had ingested, other risk factors, and warnings she had seen was highly relevant. Shortly before trial, however, plaintiff's counsel replaced the mother with the plaintiff's grandmother as the next friend of the plaintiff and decided not to bring the mother to trial. As a result, GSK would not have been able to compel critically important witnesses in the case — the mother and the out-of-state prescribing physicians — to testify in front of the Missouri jury.

The decision below is also contrary to principles of federalism. Another purpose of personal jurisdiction is to protect state sovereignty. "The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States — a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen*, 444 U.S. at 293. For that reason, a state lacks the constitutional authority to decide claims that lack the requisite connection to the state. *Id.*

The California Supreme Court's view — that a defendant with nationwide operations may be forced to defend virtually any claim in virtually any state — cannot be reconciled with these principles. The decision below usurps the authority of other states that have a stronger interest in adjudicating these claims. *See Daimler*, 134 S. Ct. at 762 n.20 ("Nothing in *International Shoe* and its progeny suggests that 'a particular quantum of local activity' should give a State authority over a 'far larger quantum of . . .

activity' having no connection to any in-state activity.").

The decision below also imposes inappropriate burdens on the California courts and the California citizens who would be called upon to serve as jurors. The typical pharmaceutical product-liability trial lasts three weeks or more, and "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil*, 330 U.S. at 508-09. Those burdens are civic duties that must be borne when the defendant resides in the forum state or the claim arises from the defendant's forum-state contacts. But where the plaintiff, the defendant, the defendant's challenged conduct, and the claimed injury are all out of state, a state court does not have the constitutional authority to effectively designate itself the hub of a nationwide multi-district litigation.[2]

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[2] The doctrine of forum non conveniens grounds is not an adequate substitute for the due process protections embodied in this Court's personal jurisdiction jurisprudence. Unlike the decision whether to dismiss for lack of personal jurisdiction, a forum non conveniens determination "is committed to the sound discretion of the trial court." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994); *see also, e.g.*, *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 751 (1991) ("Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise . . . jurisdiction . . . .").

### C. The Decision Below Imposes Additional Burdens on Parties and Courts.

Aside from the due process and federalism problems discussed above, the decision below creates difficult choice-of-law issues. When a plaintiff resides out of state and suffered her alleged injuries out of state, the forum court must wrestle with what state's law to apply. For example, if the plaintiff lives in Mississippi and her claim arose there, does the forum court apply Mississippi substantive product-liability law? In California, if there is a conflict between state laws, "the court analyzes the jurisdictions' respective interests to determine which jurisdiction's interests would be more severely impaired if that jurisdiction's law were not applied in the particular context presented by the case." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 100 (2006). In cases with plaintiffs who reside in dozens of different states, the difficulties multiply exponentially.

Divergent state laws can make a significant difference. For example, unlike in California, Mississippi's Product Liability Act expressly subsumes common-law claims, leaving plaintiffs with a statutory cause of action only. *See* Miss. Code. Ann. 11-1-63. In Pennsylvania, a plaintiff must prove punitive damages by a preponderance of the evidence; in Mississippi, clear and convincing evidence is required. *Compare Sprague v. Walter*, 656 A.2d 890, 923 (Pa. Super. 1995), *with Muirhead v. Cogan*, 158 So. 3d 1259, 1266 (Miss. Ct. App. 2015). In North Carolina, a plaintiff's contributory

negligence (of any degree) deprives the plaintiff of the right to recover. *McCauley v. Thomas ex rel. Progressive Universal Ins. Co.*, 774 S.E.2d 421, 426 (N.C. Ct. App. 2015). By contrast, in California, a negligent plaintiff may still recover. *Harb v. City of Bakersfield*, 233 Cal. App. 4th 606, 626 (2015), *review denied* (Apr. 29, 2015).

After deciding what law to apply, the parties and the court must develop jury instructions. This often happens in the charged and frantic atmosphere of trial, as attorneys must haggle over and turn a foreign jurisdiction's law into a format accessible to a jury. The foreign jurisdiction sometimes has no pattern jury instructions to rely on. And even when it does, the parties and the court often must splice together the foreign jurisdiction's substantive law with the forum state's procedural law. It is no surprise that reversible error often occurs. For these reasons, "[t]here is an appropriateness . . . in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil*, 330 U.S. at 509.

The choice-of-law problem also makes it necessary to try cases with plaintiffs from multiple states individually. Because these trials happen one by one, the few in-state plaintiffs' claims are sometimes never litigated — further confirming that the in-state plaintiffs serve only a forum-shopping purpose. In similar cases in Missouri involving Johnson & Johnson, the three cases tried to date involved plaintiffs from Alabama, South Dakota, and

California. *See Hogans et al. v. Johnson & Johnson et al.*, Cause No. 1422-CC09012-01 (Jan. 7, 2016). In the Missouri Paxil cases, the first case set for trial involved a plaintiff from West Virginia. When a state court hosts what amounts to a nationwide multi-district litigation in which in-state plaintiffs barely participate, that is a sure sign that something is amiss.

### D. The Petition Presents the Court With an Opportunity To Resolve a Well-Developed Split Involving Federal Courts of Appeals and State High Courts.

As the petition explains, the decision below further entrenches a well-developed and acknowledged split on how to interpret the "arising from" requirement — or, more to the point, whether there *is* an "arising from" requirement — for specific jurisdiction. Pet. 9-20. Many courts hold that a defendant's forum-state contacts must be the "but for" or "proximate" cause of the plaintiff's injuries. *See, e.g., Dudnikov v. Chalk & Vermilion Fine Arts*, 514 F.3d 1063, 1079 (10th Cir. 2008); *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007); *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005). The Supreme Court of Arizona also subscribes to this view. *See Williams v. Lakeview Co.*, 13 P.3d 280, 284-85 (Ariz. 2000).

A minority of courts, by contrast, reject a causation requirement altogether, reasoning that some "relationship" between the suit and the defendant's forum-state contacts is enough even if that "relationship" is not a causal one. *See, e.g.*,

*Avocent Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1336-37 (Fed. Cir. 2008). In the decision below, the California Supreme Court decisively adopted the minority view, describing the test as whether "there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim." Pet. App. 21a.

To be sure, other courts have not addressed the precise situation where out-of-state plaintiffs use a handful of in-state plaintiffs as an anchor to sue in their lawyers' preferred jurisdiction. But a split on these exact facts is unlikely ever to arise, given that plaintiffs' lawyers pick only favored jurisdictions whose courts have signaled that they welcome such filings. Plaintiffs' lawyers are not likely to bring this type of case in Arizona, for example, which requires a "causal nexus between the defendant's . . . activities and the plaintiff's claims." *Williams*, 13 P.3d at 284-85. Instead, if the decision below is allowed to stand, plaintiffs' lawyers will continue to assemble nationwide mass tort actions in California.

## II. The *BMS* Case Is An Ideal Vehicle For Resolving the Question Presented.

### A. The Fact Pattern In *BMS* Is Typical.

As explained, GSK faces mass tort suits in various jurisdictions that are materially indistinguishable from this one. If this Court were to reverse the decision below, the Court's decision would apply to all of GSK's pending cases. In addition, as explained in the PhRMA amicus brief, this case would resolve personal jurisdiction in many other

similar suits against other pharmaceutical manufacturers.

The *BMS* case is also an excellent vehicle because it clearly would have been decided differently in jurisdictions that use a "but for" or "proximate" causation standard. The majority below held that Bristol-Myers' "nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between [respondents'] claims and the company's contacts in California concerning Plavix." Pet. App. 28a. That kind of amorphous "nexus" would not be enough to satisfy the "but-for" or "proximate" causation standards, because the out-of-state plaintiffs in *BMS* would have suffered the same alleged injuries even if Bristol-Myers had never set foot in California.

If a physician prescribes a medication to a plaintiff in Florida and the plaintiff ingests the medication and suffers her alleged injuries in Florida, the defendant's marketing or distribution activities in *California* did not give rise to the plaintiff's injuries. The defendant's California activities may have given rise to other people's claims, in California, and those claims may resemble the Florida plaintiff's claims. But resemblance is not causation. In fact, the majority did not dispute that respondents' "claims would be exactly the same if [Bristol-Myers] had no contact whatsoever with California." Pet. App. 29a. Under the infinitely malleable "substantial nexus" standard, it was possible for the court below to conclude that the plaintiffs' claims are related to Bristol-Myers' activities in California, but not even an

adventuresome court could declare that Bristol-Myers' California contacts are a *cause* of the out-of-state plaintiffs' claims.

### B. Other Petitions Are Unlikely To Resolve the Question Presented.

Other pending petitions pose other personal jurisdiction questions, but none would resolve the question presented here. Granting those petitions would not be a substitute for granting BMS's petition.

1. *TV Azteca et al. v. Gloria de los Angeles Trevino Ruiz*, No. 16-481, is an intentional tort case that is more about the reach of *Walden v. Fiore*, 134 S. Ct. 1115 (2014), than *Daimler*. In *Walden*, the plaintiffs alleged that the defendant, a police officer, improperly seized and refused to return gambling proceeds. *Walden*, 134 S. Ct. at 1119. Although the seizure occurred in Georgia, the plaintiffs sued in Nevada, arguing that the officer knew that "his allegedly tortious conduct in Georgia would delay the return of funds to plaintiffs with connections to Nevada" and thus cause injury in Nevada. *Id.* This Court held that the officer did not have minimum contacts with Nevada because the "relevant conduct occurred entirely in Georgia, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction." *Id.* at 1126.

*TV Azteca* appears to turn on the application of *Walden*'s minimum contacts and purposeful availment analysis, not *Daimler*'s general vs. specific jurisdiction framework. In *TV Azteca*, Texas

residents alleged that Mexican citizens defamed them by "broadcast[ing] television programs on over-the-air signals that originate in Mexico but travel into parts of Texas." *TV Azteca* Pet. App. 1a.

After discussing *Walden*, the Texas Supreme Court approved the exercise of specific jurisdiction over the Mexican citizens. The court reasoned that the purposeful availment requirement was satisfied because the Mexican citizens "exploited the Texas market to capitalize on the broadcasts that traveled into Texas." *Id.* at 2a. Although the defendants did not intentionally direct the over-the-air signals to Texas, the defendants "took specific and substantial actions to take advantage of the fact that the signals reach into Texas and to financially benefit from that fact." *Id.* at 36a. The court also concluded that the plaintiffs' claims "arise from and relate to those broadcasts" because the plaintiffs resided in Texas and suffered injuries from viewing the broadcasts in Texas. *Id.* at 2a.

*TV Azteca* bears little resemblance to this case. Although the *TV Azteca* petition invokes the same circuit split at issue here, the difference is that the *TV Azteca* plaintiffs reside in Texas and suffered their injuries in Texas. In contrast, the *BMS* plaintiffs reside outside California and suffered their alleged injuries outside California. The central question in *TV Azteca* is whether the defendants' broadcasting of television programs in Mexico, with knowledge that they would also be viewed in Texas, satisfied the purposeful availment requirement for specific jurisdiction. The question is not whether the plaintiffs' claims arise out of the defendants' forum-

state contacts — they do, as the broadcast reached into Texas and allegedly injured Texas residents in Texas — but rather whether the defendants' forum-state contacts are too slim to support jurisdiction *even though* the claims arise out of those contacts. If this Court were to resolve that question, it would have little or no effect on the decision below.

2. In *BNSF Railway Company v. Tyrrell*, No. 16-405, the question presented involves general rather than specific jurisdiction. Although BNSF is not incorporated in Montana and does not maintain its principal place of business there, the Montana Supreme Court held that the Federal Employers' Liability Act authorizes state courts to exercise general jurisdiction. The court relied on a provision of the FELA, rather than general principles of personal jurisdiction. *See* 45 U.S.C. § 56 ("Under this chapter an action may be brought in a district court of the United States . . . in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."). The question in that case is thus whether the FELA allows state courts to exercise general jurisdiction even when the defendant is not "at home" in the forum state under *Daimler*. Whatever the answer to that question of *general* jurisdiction in FELA cases, it does not address whether a company is subject to *specific* jurisdiction over the claims of out-of-state plaintiffs who claim out-of-state injuries.

3. *Mylan Pharmaceuticals v. Acorda Therapeutics, Inc.*, No. 16-360, is about whether

anticipated *future* conduct can support specific jurisdiction. The question presented is "[w]hether the mere filing of an abbreviated new drug application by a generic pharmaceutical manufacturer is sufficient to subject the manufacturer to specific personal jurisdiction in any state where it might someday market the drug." *Mylan Pharmaceuticals* Pet. i.

The Federal Circuit determined that the filing of such an application subjects a defendant to specific jurisdiction when the filing "reliably indicate[s] plans to engage in" marketing in the forum state. *Mylan Pharmaceuticals* Pet. 1. The issue in *Mylan Pharmaceuticals* thus turns on whether predictions about the future can be enough to support specific jurisdiction, or whether courts must rely only on the defendant's "actual suit-related conduct at the time of the suit." *Id.* at 2. Because *BMS* does not involve anticipated future conduct, a grant of certiorari in *Mylan Pharmaceuticals* will not resolve the question here.

GSK takes no position on whether the Court should grant *TV Azteca*, *BNSF Railway Company*, or *Mylan Pharmaceuticals*. But the Court should not grant them in place of *BMS*.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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RECORD AND BRIEF.

Supreme Court, U.S.
FILED
NOV 10 2016
OFFICE OF THE CLERK

No. 16-466

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
*Respondent.*

**On Petition for a Writ of Certiorari to the California Supreme Court**

## BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS*[1]

Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate public policies that encourage the discovery of medicines that help patients lead longer, healthier, and more productive lives. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates as amicus in cases, including by filing *amicus curiae* briefs with this Court in cases raising matters of significance to its members.

The question presented is critically important to PhRMA's members because they, like the petitioner, offer products or services nationwide and are frequently subject to claims of personal injury arising from the use of those products and services. Tens of thousands of individuals have filed such claims against PhRMA members just in the past five years. Many of those claims have been filed in the California state courts by out-of-state plaintiffs alleging injuries from events that occurred outside of California. By asserting specific jurisdiction over petitioner, the California Supreme Court departed from the predominant view that bars such jurisdiction in the absence of a causal relationship between the defendant's forum contacts and the plaintiff's claims.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs have been filed with the Clerk of the Court.

PhRMA has a strong interest in the uniform application of standards for personal jurisdiction that comport with fundamental principles of due process. In resolving disputes over personal jurisdiction, this Court has consistently applied the Due Process Clause to protect the values of fairness and interstate federalism. The formless standard that California's high court has endorsed, however, fundamentally rejects those values. The decision below allows the California courts to become magnets for disputes with no causal connection to events in California. Such magnet jurisdictions distort the development of the law and the legal process and create uncertainty and unfairness for many of PhRMA's members, including those with similar, active litigation in California and other magnet jurisdictions. PhRMA therefore urges the Court to grant the petition and clarify the "relatedness" test for specific jurisdiction.

## INTRODUCTION

The constitutional limits upon a state court's exercise of personal jurisdiction serve two distinct functions. One – which is addressed, though not adequately protected, by the decision below – is to protect a nonresident defendant "against the burdens of litigating in a distant or inconvenient forum." *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). The second, however, is "to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* The majority opinion gave this interest little attention, and its decision effectively nullifies it.

The decision below authorizes California state courts to exercise personal jurisdiction over nonresident defendants in disputes with nonresident

plaintiffs that are not causally connected to conduct or injury occurring in-state. For these disputes, the decision permits California's state courts to serve, in effect, as a national court. Allowing the courts of a single state to assume such a role violates "the principles of interstate federalism" that the Due Process Clause protects and undermines the fair resolution of product liability disputes. *Id.* at 293-94.

The Court should grant the petition because the decision below is of enormous practical significance for business in general and, in particular, for PhRMA's members. The lower courts have long disagreed about whether specific jurisdiction requires a causal connection between the defendant's forum contacts and the plaintiff's claims. No prior decision rejecting the need for a causal connection, however, has had so broad and disruptive an impact.

Thousands of nonresident plaintiffs already have claims pending in California courts against nonresident pharmaceutical manufacturers, and thousands more such claims inevitably will follow. Allowing these claims to proceed in the courts of a state where the injury did not occur and where key independent witnesses such as a plaintiff's treating physicians cannot be subpoenaed to testify at trial, is fundamentally unfair to defendants. And allowing California courts, which are wholly unaccountable to the residents of other states, to serve as the forum for the resolution of disputes that largely involve the residents of those states, undermines the principles of interstate federalism that the Due Process Clause protects. As long as the divide persists, courts that do not require a causal connection between the defendant's forum contacts and the plaintiff's claims will exert disproportionate adjudicatory power in cases involving corporations with nationwide sales.

The factual similarity of this case to many other pending cases, and the absence of any causal connection between the alleged injuries of out-of-state plaintiffs here and the alleged forum contacts, makes this an ideal vehicle to address the longstanding conflict among lower courts as to the scope of specific jurisdiction. The Court should grant the petition and resolve whether specific jurisdiction requires a causal connection between the nonresident defendant's forum contacts and the events giving rise to a nonresident plaintiff's claim

## ARGUMENT

### I. WHETHER CALIFORNIA COURTS CONSTITUTIONALLY MAY SERVE AS NATIONAL COURTS FOR RESOLVING CLAIMS OF OUT-OF-STATE PLAINTIFFS IS A PROFOUND AND RECURRING QUESTION.

The question presented reflects a deep divide among the lower courts over the scope of specific jurisdiction. It is also extremely important. Like the petitioner, many companies, and particularly pharmaceutical companies, are not at home in California for purposes of general jurisdiction. Also like petitioner, these companies do not plan their marketing in California, and yet they sell their products nationwide and support some personnel and facilities in California. Allowing California to seize on these contacts to arrogate the power to resolve the causally unrelated claims of out-of-state plaintiffs is irreconcilable with fundamental fairness and interstate federalism.

### A. The Decision Below Widens The Conflict Over Whether Specific Jurisdiction Requires A Causal Relationship Between The Defendant's Forum Contacts And The Plaintiff's Claims.

A court may assert general personal jurisdiction over a corporation if it is "at home" within the forum state. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751, 760-62 (2014). If a defendant is not at home in the forum, however, a court may nonetheless have specific jurisdiction over that defendant, but only if the litigation itself "aris[es] out of or relate[s] to" the defendant's conduct within the forum state. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 923-24 (2011) (alterations in original) (citations omitted). The Court has not resolved, however, whether litigation can arise out of or relate to a given forum if there is no causal connection between the defendant's forum contacts and the plaintiff's claims.

The decision below permits a California state court to assert specific jurisdiction over a non-resident defendant facing claims brought by out-of-state plaintiffs based on events occurring entirely outside of California. Pet. App. at 1a-2a, 4a-5a. The majority below acknowledged that the defendant's challenged sales and marketing were designed out-of-state and conducted nationwide. *Id.* at 28a. The out-of-state plaintiffs' claims were "related" to the defendant's in-state conduct (according to the majority) because their claims arose from the same nationwide sales and marketing as the claims of California plaintiffs joined in the action. *Id.* As the dissenting opinion explains, this "expands specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction,"

and "creates the equivalent of general jurisdiction in California courts." *Id.* at 50a (Werdegar, J., dissenting).

As the petition explains, the question presented not only divided the California Supreme Court but reflects a broader division of authority among the federal and state appellate courts. Pet. at 9-20. Most courts hold that litigation "aris[es] out of or relate[s] to" defendant's in-state conduct only if there is some causal connection between that conduct and the plaintiff's claim. *Id.* at 11-14. A minority hold that no causal connection is required, and that a "substantial" or "material" connection, one evaluated by indeterminate standards on the facts of each case, is enough. *Id.* at 14-16.

The latter approach seems plainly inconsistent with *Daimler*. To be sure, *Daimler* addresses general, rather than specific, jurisdiction. But the whole point of having a test for general jurisdiction is to have a means of determining when a nonresident defendant's contacts with a forum – those causally unrelated to the events in dispute – are sufficient to satisfy due process. That test is moot if the same general contacts insufficient to render a defendant "at home" in a state confer specific jurisdiction in any case involving the defendant's products.

The decision below also is irreconcilable with the fundamental values of fairness to non-residents and interstate federalism that the Due Process Clause requires courts to honor when assessing the scope of personal jurisdiction. To be sure, "progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Nonetheless, this Court "ha[s] never accepted the proposition that state lines are irrelevant for

jurisdictional purposes, nor could [it], and remain faithful to the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagon Corp.*, 444 U.S. at 293. Instead, the Court has recognized that "[t]he sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its Sister states" that is "express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.* Allowing one state's courts to serve as the national forum for resolving the disputes of out-of-state plaintiffs against out-of-state defendants arising from out-of-state events is irreconcilable with the constitutional scheme of interstate federalism.

The persistent division of opinion in the lower courts, and the inconsistency between the result below and the constitutional limitations on personal jurisdiction that this Court has repeatedly enforced, aptly illustrate the importance of the question and the need for plenary review. This Court should grant the petition to provide a uniform, administrable standard of specific jurisdiction that preserves an appropriate balance of adjudicatory power among state courts.

### B. The Decision Below Directly Affects Other Comparable Pending Litigation.

The Court also should grant the petition because the issue is important not just to the individual petitioner but to all companies that market their products nationwide. PhRMA's members, for example, include pharmaceutical manufacturers that are not incorporated in California. Like the petitioner, these companies develop and sell medicines that are approved by the Federal Food and Drug Administration for marketing throughout the United States and for use, as appropriate, by patients

throughout the United States. Like the petitioner, these companies employ, often in each of the 50 states, representatives who are knowledgeable about their prescription products to meet with and address the questions of prescribing physicians. Like the petitioner, these companies often develop, at their headquarters, nationwide marketing plans, consistent with the standardized drug labeling that FDA has approved to accompany the medicine nationwide. Many pharmaceutical companies have facilities in states other than their home state, such as research hubs in California that may focus on a particular disease or product line.

Pharmaceutical companies also are routinely subject to litigation involving drugs that are marketed, sold, and distributed nationwide. FDA approval to market a drug generally reflects the FDA's judgment not that use of the drug is risk-free, but that the drug's benefits "outweigh their known risks" for the population as a whole.[2] But with any prescription drug, risks remain and individual experiences will vary. Because their products are widely used and rarely risk-free, pharmaceutical companies are frequently defendants in product liability cases that involve large numbers of plaintiffs in many states who assert that they and/or their doctors were exposed to nationwide sales and marketing campaigns.

Given these commonalities, the core facts cited to support specific jurisdiction in the decision below will

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[2] *See* FDA, *Development and Approval Process (Drugs)*, http://www.fda.gov/Drugs/DevelopmentApprovalProcess/ (last updated Jan. 29, 2016) (explaining that the FDA's drug approval process "ensures that drugs, both brand-name and generic, work correctly and that their health benefits outweigh their known risks").

be found in many other product liability cases involving other pharmaceutical companies. For example, the majority concluded that "BMS's nationwide marketing, promotion, and distribution of Plavix" created the "substantial nexus" between the nonresident plaintiffs' claims and BMS's contacts with California. Pet. App. at 28a. All of PhRMA's members engage in some form of nationwide marketing, promotion, and distribution of their drugs. The majority also cited BMS's "other activities" in California, such as the maintenance of research and development facilities unrelated to the development of Plavix. *Id.* at 5a-6a, 32a. Many of PhRMA's members have facilities in California that conduct activities unconnected to events that out-of-state plaintiffs allege cause their injuries. Because the same facts that supported specific jurisdiction in Petitioner's case will be present in many cases involving PhRMA's members, the question presented is important to the industry as a whole and will affect many other cases.

Indeed, the instant case is but one example among many in which California courts are entertaining claims that collectively involve thousands of out-of-state plaintiffs against nonresident pharmaceutical companies. A recent study of more than 2,900 cases filed against pharmaceutical companies in Los Angeles and San Francisco counties between January 2010 and May 2016, showed that these complaints combined the claims of over 25,000 individual plaintiffs, and that only 10.1% of these individuals were California residents.[3] The remaining 89.9% —

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[3] Ryan Tacher, Civil Justice Ass'n of Cal., *Out-of-State Plaintiffs: Are Out-of-State Plaintiffs Clogging California Courts?* 2 (2016), http://cjac.org/what/research/CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf.

over 20,000 individual claimants — were residents of another state.[4] California state courts are thus effectively acting as national courts in pharmaceutical product litigation not just for the many out-of-state plaintiffs who have sued BMS in cases involving Plavix, but for thousands of claims of other out-of-state plaintiffs against other out-of-state manufacturers in cases involving a variety of other pharmaceutical products. Because the decision below is binding precedent for all California courts on the question presented, this Court should grant review.

### C. The Decision Below Disregards Long-Standing Principles Of Fairness And Interstate Federalism That The Due Process Clause Protects.

The enforcement of due process limits on personal jurisdiction serves "two related, but distinguishable, functions." *World Wide Volkswagon Corp.*, 444 US. at 291-92. "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292. The decision below eviscerates both of these core functions.

1. By filing suit in a state far away from the one where a plaintiff resides and was injured, a plaintiff can effectively limit a pharmaceutical company's ability to put on a full and fair defense. In many pharmaceutical product liability cases, the outcome can turn on the testimony of an independent witness – the plaintiff's prescribing physician. The

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[4] *Id.*

prescribing physician can testify authoritatively as to the information she had about the risks and benefits of the drug and how she weighed those risks and benefits before deciding to prescribe the drug to the plaintiff. Such testimony is, as a matter of state law, often critical to the assessment of liability. *See, e.g.*, *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1116 (1996) ("[I]n the case of prescription drugs, the duty to warn runs *to the physician*, not to the patient."); *Valentine v. Baxter Healthcare Corp.*, 68 Cal. App. 4th 1467, 1483 (1999) ("In the case of prescription drugs . . . it is through the physician that a patient learns of the properties and proper use of the drug . . . ."). And because juries typically do not view physicians as aligned with either of the parties, a physician's testimony is often critical to the jury's resolution of the merits. The testimony of the plaintiff's prescribing physician often plays a central role in a pharmaceutical company's defense of products liability cases.

State courts are limited, however, in their power to compel out-of-state witnesses to appear at trial. A California court, for example, has no power to compel nonparty witnesses from other states to appear at trial in California. *See* Cal. Code Civ. Proc. § 1989. Such limitations are common and reflect longstanding limits on the judicial power of state sovereigns that modern minimum contacts analysis does not overcome for non-party witnesses, such as physicians, in civil trials. *See, e.g.*, *Colo. Mills, LLC v. SunOpta Grains & Foods Inc.*, 269 P.3d 731, 733 (Colo. 2012) (holding that "as a matter of state sovereignty," Colorado courts "have no authority to enforce civil subpoenas against out-of-state nonparties"); Marc Fuller, *Jurisdictional Issues in Anonymous Speech Cases*, 31 Comm. Law. 24, 26

(2015) ("[S]ubpoena power is governed by the 'strict territorial approach' of *Pennoyer v. Neff*."). While the defense can play videotaped excerpts of a discovery deposition of an out-of-state witness, the inability to tailor the trial examination to the key issues brought forth in subsequent expert analysis and at the trial itself is a severe limitation on an effective defense. Not being able to compel the presence of a key witness at trial is plainly one of the "burdens of litigating in a distant or inconvenient forum," *World Wide Volkswagen*, 444 U.S. at 292, and one that the decision below imposes en masse without regard to its negative impact on the fundamental fairness of the trial of products liability cases.

2. The majority below acknowledged that "the fact that the nonresident plaintiffs greatly outnumber the California plaintiffs does give us some pause." Pet. App. 39a. Nonetheless, to justify its sweeping assertion of jurisdiction to resolve the claims of the nonresidents, the majority opinion cited to *California's* interests in providing an efficient judicial mechanism for resolving national disputes, its interest in regulating conduct that affects consumers. *Id.* at 38a-41a. Nowhere, however, did the majority consider how assertion of its interests would affect the ability of other states to vindicate their interests in regulating conduct that affects their residents. California's expansive interpretation of its jurisdiction disrupts the proper balance of federal and state adjudicatory power.

The premise of the decision below – that the courts of one state may serve as national courts for the complaints of residents of all states – fundamentally conflicts with a system of interstate federalism. State courts with expansive views of specific jurisdiction destroy interstate federalism by hearing a

disproportionate share of cases that require application of another state's laws. If the decision below were to stand, the California court presiding over petitioner's case could be in the position of applying the laws of the 33 different states in which the out-of-state plaintiffs reside. Pet. App. at 2a. Not only do state courts frequently lack the experience applying the law of other states that federal courts necessarily develop, but the courts of any one state necessarily lack any "accountability to the residents of any other State."[5] A state that develops the law of other states regulating the conduct of non-resident defendants as it affects non-resident plaintiffs necessarily deprives the directly affected states of the ability to address those same issues in the manner most appropriate for their state.

Such an approach also usurps the role of the federal courts, which the Constitution envisioned as the proper locus for litigation of nationwide significance, and which provides for the efficient coordination of pretrial proceedings where appropriate without sacrificing basic values of fairness in the eventual trial of individual disputes. In federal court, Multi-District Litigation ("MDL") proceedings allow, in appropriate cases, for the efficient administration of pre-trial proceedings in a single court. *See* Pet. App. at 73a (Werdegar, J., dissenting) ("No mechanism

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[5] *See* H.R. Rep. No. 106-320, at 8-9 (1999) ("Because of the way in which they have overreached in the use of the class device, some State courts have effectively made themselves the arbiters of the laws of other States, raising serious federalism concerns . . . . [A] single State court decides the law of many other jurisdictions, effectively telling other States what their laws are with no input from the judiciaries of those other jurisdictions. Again, this practice means that a State court, which has no accountability to the residents of any other State, is dictating applicable laws to out-of-State residents.").

exists for centralizing nationwide litigation in a state court . . . . If efficiency is the goal, federal litigation centralized through the multidistrict procedure offers a more promising path than a series of uncoordinated state and federal court actions.). If the coordinated cases continue beyond pre-trial proceedings, they are remanded to the transferor court, which will generally have expertise in the applicable state law and the power to compel appropriate non-party witnesses to testify.

No similar mechanism for efficiently coordinating nationwide tort litigation exists in any one state court. Instead, when a few state courts interpret specific jurisdiction expansively and draw in out-of-state claims, they overreach their role as "coequal sovereigns in a federal system" (*World-Wide Volkswagen*, 444 U.S. at 292) and disregard the "territorial limitations on the power of the respective States." (*Hanson*, 357 U.S. at 251). When California's (or other state's) courts serve as national courts for products liability cases, they encroach on the jurisdictional territory of other sovereigns, and deny other sovereigns opportunities to assert their interests in directing the evolution of their own state law, and serving as the forum for their residents to seek redress.

State court overreaching also diminishes the role of federal courts in hearing cases of national significance. As Congress acknowledged in the Class Action Fairness Act ("CAFA"), the "intent of the framers" was that federal courts would hear "interstate cases of national importance." Pub. L. No. 109-2, §2(b)(2), 119 Stat. 4, 5 (2005) (codified at 28 U.S.C. § 1711 (note)). A federal forum is important for defendants because state and local courts sometimes engage in "[a]buses," including "keeping

cases of national importance out of Federal court," "acting in ways that demonstrate bias against out-of-State defendants;" and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." *Id.* § 2(a)(4), 119 Stat. at 5. Congress intended CAFA to address these issues in part by allowing defendants to remove mass actions to federal court under a variety of circumstances, *id.* § 5(a), 119 Stat. at 12-13 (codified at 28 U.S.C. § 1453(b)), but out-of-state plaintiffs have often evaded CAFA by filing a series of complaints that each names fewer than 100 plaintiffs. Similarly, they attempt to defeat removal jurisdiction by naming an in-state entity, such as a distributor, as a defendant even in situations where there is no actual connection between the in-state entity and the plaintiffs. *See* Pet. App. at 59a (Werdegar, J. dissenting) (describing the majority's reference to McKesson as "perhaps the ruddiest" of all "the majority's red herrings" because "at no point have real parties argued McKesson bore any responsibility in providing them Plavix.").[6] Even when defendants expose such maneuvers as improper, litigating the issues wastes resources and disrupts the orderly administration of the law.[7]

3. Finally, the decision below compounds the uncertainty over jurisdiction for companies that

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[6] Docket searches indicate that McKesson has been named as a defendant in 795 of the 1,499 products liability cases filed against pharmaceutical companies in Los Angeles County in the past five years.

[7] *See, e.g., In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 2014 U.S. Dist. LEXIS 67675, at *11 (E.D. Pa. May 15, 2014) (concluding six years after the issue was first raised that the case was "mature enough" to determine that McKesson was misjoined).

market their products nationwide, and particularly for pharmaceutical companies.

*Daimler* acknowledged that predictability is an important aspect of due process, noting that even corporations with nationwide sales are entitled to some "minimum assurance[s]" about where their conduct will render them liable to suit. *Daimler*, 134 S. Ct. at 760-62; *see also Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Predictability is valuable to corporations making business and investment decisions."). But in state courts with expansive views of how to apply the "relatedness" standard for personal jurisdiction, *Daimler*'s limits on general jurisdiction are simply mooted for companies with nationwide sales and marketing. As the dissent observed, an expansive view of specific jurisdiction "subject[s] companies to the jurisdiction of California courts to an extent unpredictable from their business activities in California." Pet. App. at 50a (Werdegar, J., dissenting).

It is no answer to say that all national sellers can predict that they will be sued in every court in the land, because there is no predictable relationship between the distribution of a company's products across the 50 states and the company's products liability cases. *See* Pet. App. at 79a (Werdegar, J., dissenting). Nor can companies predict which courts will become magnet jurisdictions and how disproportionate their impact on products liability law may become.

For example, pharmaceutical companies also face thousands of personal injury claims in St. Louis, another magnet jurisdiction with state courts that expansively construe personal jurisdiction. None of the defendants in those cases is "at home" in Missouri, and the vast majority of the claims against

them have been brought by out-of-state residents. *See, e.g., Lovett v. Pfizer Inc.*, No. 1422-CC00225-01 (St. Louis Cir. Ct. Mar. 27, 2014) (three in-state plaintiffs and 88 out-of-state); *Anthony v. Bayer Corp.*, No. 1622-CC09415 (St. Louis Cir. Ct. June 10, 2016) (nine in-state plaintiffs and 86 out-of-state); *Hogans v. Johnson & Johnson*, No. 1422-CC09012-01 (St. Louis Cir. Ct. Sept. 29, 2014) (two in-state plaintiffs and 63 out-of-state).[8]

An appeal pending in the Eighth Circuit presents a similar issue. *See* Brief of Appellant at 5, *Robinson v. Pfizer, Inc.*, No. 16-2524, (8th Cir. Sept. 8, 2016) (asking "[m]ay a court, consistent with due process, exercise personal jurisdiction over claims by non-resident plaintiffs against a non-resident defendant based solely on their joinder in a single complaint with claims of resident plaintiffs over which the court has specific jurisdiction?"); *see also* Defs.' Mot. to Stay Proceedings at 1, *Tenny v. Bayer Corp.*, No. 4:16-cv-1189 (E.D. Mo. Sept. 30, 2016) (Dkt. 36) (seeking a stay in a similar case pending a ruling in *Robinson*). Thus, the question presented is one of importance not just for resolving litigation pending in California, but for litigation pending in other jurisdictions as well, involving claims of thousands of individuals.

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[8] Plaintiffs reportedly flock to St. Louis because of its reputation for denying motions to dismiss, providing little gatekeeping on expert testimony or other evidentiary restrictions, affording a jury pool friendly to plaintiffs, and upholding outsized verdicts; of the top six product defect verdicts in the United States in 2016, half came out of the St. Louis court. *See* Margaret Cronin Fisk, *Welcome to St. Louis, the Hot Spot for Litigation Tourists*, BloombergBusinessweek (Sept. 29, 2016), http://www.bloomberg.com/news/articles/2016-09-29/plaitiffs-lawyers-st-louis.

## II. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

This case is an ideal vehicle for addressing the "relatedness" standard for personal jurisdiction because its relevant facts commonly arise and the outcome turns on a single question of law. As shown above, many pharmaceutical companies not "at home" in California are regularly sued in California and other state courts in complaints brought primarily by out-of-state plaintiffs.

Since *Daimler*, several courts have addressed whether a court's specific jurisdiction extends to the claims of out-of-state plaintiffs against pharmaceutical companies.[9] And the same question

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[9] *See e.g., Bartholome v. Pfizer, Inc.*, 2016 WL 366795, at *1 (E.D. Mo. Jan 29, 2016) ("Defendant's only contacts with Missouri are that they marketed and sold Zoloft in Missouri. These contacts do not relate to the causes of action in this suit, which arise out of Mother Plaintiff's ingestion of Zoloft in Florida and Minor Plaintiff's subsequent birth."); *Barron v. Pfizer, Inc.*, 2015 WL 5829867, at *1 (E.D. Mo. Oct. 6, 2015) (Pfizer's "only contacts with Missouri are that they marketed and sold Zoloft in Missouri. These contacts do not relate to the causes of action in this suit, which arise out Ms. Barron's ingestion of Zoloft in Florida and Alexander Barron's subsequent birth" with birth defects plaintiffs alleged were caused by Zoloft); *Torres v. Johnson & Johnson*, 2015 WL 4888749, at *5 n.5 (S.D. W. Va. Aug. 17, 2015) ("The finding of specific jurisdiction over the claims of the four New Mexico plaintiffs . . . does not support a finding of personal jurisdiction over the claims of the out-of-state defendants, whose claims have no nexus to the forum."); *Tulsa Cancer Inst., PLLC v. Genentech, Inc.*, 2016 WL 141859, at *4 (N.D. Okla. Jan. 12, 2016) (noting that personal jurisdiction must be established as to each plaintiff's claim); *In re Zofran Prods. Liab. Litig.*, 2016 WL 2349105, at *5 (D. Mass. May 4, 2016) (unpublished) (holding that a Missouri court would not have specific personal

arises in other product liability cases involving non-pharmaceutical products. Because Petitioner's case is typical of other cases in which jurisdiction is effectively premised on a company's nationwide sales and marketing rather than on any conduct in the forum causally related to the individual's suit, it is an ideal vehicle for addressing the relatedness test, and a natural next case to follow *Goodyear* and *Daimler*. It would enable the Court to resolve whether the principles underlying *Daimler, Goodyear*, and *World-Wide Volkswagen* apply more generally to product defect cases involving out-of-state plaintiffs injured out-of-state by a product manufactured, purchased and used out of the state.

The pending petition for certiorari in *TV Azteca* provides some further confirmation that the lower courts need guidance from this Court about how to apply the "relatedness" test. Pet. for a Writ of Cert. at i, *TV Azteca v. Ruiz*, No. 16-481 (Oct. 7, 2016), *available at* 2016 WL 5940880 ("TV Azteca Pet."). As between the two petitions, however, the *Bristol-Myers* petition provides a better vehicle for resolving the "relatedness" issue. Unlike in *TV Azteca*, the decision below turned entirely on the standard for "relatedness." *See* Pet. at 33; Pet. App. at 51a (Werdegar, J. dissenting) ("The key issue here is therefore whether the claims of the real parties in interest (plaintiffs residing in states other than California) arise out of or are otherwise related to, BMS's activities in California.").

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jurisdiction over claims brought by out-of-state plaintiffs); *Clarke v. Pfizer Inc.*, 2015 WL 5243876, at *2 (E.D. Mo. Sept. 8, 2015) (unpublished) (Flessing, J.) (holding that Pfizer's marketing and selling of Zoloft in Missouri did not relate to plaintiff's claim of injury in Nebraska); *accord In re Plavix Related Cases*, 2014 WL 3928240, at *1, 8-9 (Ill. Cir. Ct. Aug. 11, 2014 ) (unpublished).

In contrast, *TV Azteca* involves additional facts and legal issues that may not allow the court adequately to clarify the question presented in *Bristol-Myers*. In *TV-Azteca*, the Respondent alleged that petitioners in Mexico defamed her in a series of television reports broadcast in Mexico but viewable in Texas as well. The Respondent filed suit in Texas, where she was living temporarily. TV Azteca Pet. at 1-3.

Because the plaintiff in *TV Azteca* resided in Texas and the broadcast at issue allegedly caused harm to the plaintiff in Texas (*see* TV Azteca Pet. App. at 1a, 40a), a decision in that case may not adequately resolve the question, cleanly presented by the decision below, of a state court's exercise of jurisdiction over an out-of-state injury to an out-of-state plaintiff. *TV Azteca* also involves an alleged failure to "heed this Court's admonition" about respect for international comity, TV Azteca Pet. at 3, which is an additional factor counseling restraint that is not applicable to the decision below. Most importantly, the TV Azteca petition argues that the Texas Supreme Court improperly found specific jurisdiction without applying the "focal point" test from *Calder v. Jones*, 465 U.S. 783 (1984), and suggests that resolution of the focal point test could be outcome determinative. *See* TV Azteca Pet. at 3 ("Texas's rejection of *Calder*'s 'focal point' requirement was outcome determinative."). Indeed, the Texas Supreme Court devoted most of its analysis to the "focal point" issue.[10] The decision below, by contrast, fully aired the "relatedness" issue in extended opinions devoted to that issue by both the majority and the dissent.

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[10] *Compare* TV Azteca Pet. App. at 7a-37a (addressing the "focal point" issue), *with id.* at 38a-42a (addressing relatedness).

Finally, products liability cases are better-suited for announcing generally applicable jurisdictional rules than defamation cases because the latter can involve peculiarities such as the "single publication rule," which allows only a single action per publication. *See* Pet. App. at 69a-71a (Werdegar, J., dissenting) (explaining aspects of *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) that limit its applicability to BMS's case). Resolving the overarching specific jurisdiction rule in the *Bristol-Myers* matter will therefore provide the clearest guidance to the lower courts facing innumerable comparable matters.

Because the decision below is an ideal vehicle to answer the important and recurring question presented and to resolve a persistent split among the lower courts, the petition should be granted.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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November 10, 2016

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IEF8

Supreme Court, U.S.
FILED
NOV 10 2016
OFFICE OF THE CLERK

No. 16-466

# In The Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, ET AL.,

*Respondents.*

**On Petition for a Writ of Certiorari to the California Supreme Court**

## BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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# BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

## INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit corporation with 94 corporate members representing a broad cross-section of American industry. Those members include manufacturers and sellers of a variety of products, including automobiles, trucks, aircraft, electronics, cigarettes, tires, chemicals, pharmaceuticals, and medical devices. (A list of PLAC's corporate members is appended to this brief.) PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability litigation and PLAC's members. This is such a case.

## STATEMENT

This case raises a significant and recurring question of federal constitutional law that has sharply divided the lower federal and state courts. The issue concerns a crucial limitation imposed by

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[1] All parties have submitted to the Clerk letters granting blanket consent to the filing of *amicus* briefs. Pursuant to S. Ct. Rule 37.2, PLAC states that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, *amicus* states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

the Due Process Clause on the exercise of *in personam* jurisdiction by state courts (and federal courts applying state long-arm statutes), namely: What is the requisite nexus between a nonresident defendant's contacts with the forum and the plaintiff's legal claims? Only this Court can provide a definitive and nationally uniform answer to that question.

1. *Specific Jurisdiction and the Origins of the Nexus Requirement.* The Fourteenth Amendment's Due Process Clause limits the power of a state court to render a valid judgment against a nonresident defendant. *Kulko* v. *Superior Court of California*, 436 U.S. 84, 91 (1978). A court may exercise *in personam* jurisdiction only if the defendant has "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). The minimum-contacts requirement ensures that a defendant has "fair warning" that a decision to engage in particular activities may subject it to the jurisdiction of a foreign sovereign. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985).

The nature of forum contacts that provide such fair warning hinges on whether a court is exercising "general" or "specific" jurisdiction. See *id.* at 472-73 & n.15; *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 757 (2014) (referring to "'the essential difference between case-specific and all-purpose (general) jurisdiction'") (quoting *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 927 (2011)). "For an individual

[defendant], the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation *is fairly regarded as at home*" (such as the state of incorporation or principal place of business). *Goodyear*, 564 U.S. at 924 (emphasis added).

Cases involving specific jurisdiction, this Court has explained, require a lesser showing of forum contacts by the defendant but allow jurisdiction only if the plaintiff's claims "arise out of or relate to" those contacts. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 & nn.8-9 (1984). In *Helicopteros*, Justice Brennan, alone in dissent, criticized the majority for "refusing to consider any distinction between controversies that 'relate to' a defendant's contacts with the forum and causes of action that 'arise out of' such contacts." 466 U.S. at 420 (dissent). The majority responded:

> Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists.

466 U.S. at 415 n.10. Only Justice Brennan addressed these issues.

2. *The Development of A Circuit Split Following* Helicopteros, *and This Court's Decision in* Shute. The federal circuits gave conflicting answers to the questions identified but reserved in *Helicopteros*. In

*Shute* v. *Carnival Cruise Lines*, 897 F.2d 377 (1990), the Ninth Circuit, agreeing with several circuits but disagreeing with several others, adopted a "but for" standard, rejecting the more restrictive "proximate cause" test. *Id.* at 383-86. This Court then granted review to address the nexus requirement as well as a second question concerning the enforceability of a forum-selection clause. See 498 U.S. 807 (1990) (order).[2] Ultimately, the Court reversed based on the forum-selection clause without reaching the nexus requirement. 499 U.S. 585, 589-90 (1991).

3. *The Growing Confusion and Conflict Following* Shute. As the petition demonstrates (Pet. 11-14), the conflict in the lower courts has deepened since *Shute*. At least two circuits and three state supreme courts have joined the "but for" camp; three other circuits have adopted the "proximate cause" standard. A third group of courts – including one circuit and three state supreme courts – have developed a new and even more expansive "substantial connection" or "discernible relationship" test that can be satisfied in the absence of *any* causal relationship ("but for" or proximate) between a defendant's forum contacts and the plaintiff's claims. See pages 10-11, *infra*.

4. *This Court's Recent Decisions.* In recent years, this Court has issued a series of decisions

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[2] See No. 89-1647 Pet. for Cert. i, 5, 8 & n.6 (citing circuit split and asking Court to decide "what sort of relationship must exist between the litigation and the defendant's activities in the forum state so as to support the assertion of specific jurisdiction").

aimed at clarifying the principles governing *in personam* jurisdiction and reining in lower courts that had sought to either "stack[] the deck" in the jurisdictional inquiry or assert jurisdiction that was "exorbitant" or "unacceptably grasping." *Daimler*, 134 S. Ct. at 759, 761. Thus, in *Goodyear*, this Court (a) rejected an approach by the North Carolina Court of Appeals that "[c]onfus[ed] or blend[ed] general and specific jurisdictional inquiries," clarifying that the "stream of commerce" theory was *not* a proper basis for general (as opposed to specific) jurisdiction; (b) clarified the permissible bases for the exercise of general jurisdiction (see pages 2-3, *supra*); and (c) reaffirmed certain limits on specific jurisdiction in product liability cases. 564 U.S. at 919-20, 924-29.[3]

5. *The Decision Below.* This case involves 575 non-California residents (respondents here) who brought suit in California state court alleging various California product liability claims against petitioner Bristol-Myers based on respondents' use of Plavix, a prescription drug manufactured by Bristol-Myers. Pet. 5 & n.1. All of respondents' claims were based on injuries allegedly occurring outside of California as a result of prescriptions written and filled out-of-state. Pet. 6.

The California Supreme Court unanimously held that, under *Daimler* and *Goodyear*, California

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[3] See also *Daimler*, 134 S. Ct. at 760-61 (clarifying general jurisdiction); *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U.S. 873, 877, 879-87 (2011) (plurality) (clarifying "stream of commerce" theory and reining in New Jersey Supreme Court's unduly expansive approach); *id.* at 887-92 (Breyer, J., joined by Alito, J., concurring) (same).

courts may not exercise general jurisdiction over Bristol-Myers. Pet. App. 11a-19a, 44a; *id.* at 46a (dissent). A 4-3 majority, however, upheld the exercise of specific jurisdiction. *Id.* at 20a-45a. With regard to the crucial nexus requirement, the majority explained that, under prior California precedent, a "claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction"; it is enough that a claim bears a "substantial connection" to defendant's forum contacts. *Id.* at 25a, 27a (internal quotations omitted). The majority applied a "sliding scale" approach under which "the intensity of forum contacts and the connection of the claim to those contacts are inversely related." *Id.* at 25a (internal quotations omitted).

Applying those standards, the majority concluded that California courts could exercise specific jurisdiction over Bristol-Myers in cases involving Plavix that was prescribed, distributed, sold by a pharmacy, ingested, and allegedly caused injuries to nonresidents, all outside of California. In so concluding, the majority relied substantially on the fact that Bristol-Myers, in California, had sold "the same allegedly defective product" to other consumers and had engaged in the same nationwide "marketing and promotion" of Plavix. Pet. App. 28a. The court also invoked the sliding scale to conclude that Bristol-Myers's "extensive contacts with California establish minimum contacts based on a less direct connection between [Bristol-Myers's] forum activities and plaintiffs' claims than might otherwise be required," pointing to the fact that Bristol-Myers, in

California, had sales representatives, a distributor, and certain research and development facilities (which had not been involved in Plavix's development). *Id.* at 29a-32a. Three Justices dissented. *Id.* at 46a-87a.

## SUMMARY OF ARGUMENT

This case presents the Court with a valuable opportunity to address an important and recurring issue of federal constitutional law on which the lower federal and state courts are hopelessly divided: What nexus is required by due process between a nonresident defendant's forum contacts and the plaintiff's claims before specific jurisdiction may be exercised? Only this Court can provide a definitive and nationally uniform answer.

I. The conflict is deep, acknowledged, and entrenched. It includes multiple instances (as here) of divergent positions taken by a state supreme court and the federal circuit in which it sits. The issue has been exhaustively litigated by state and federal courts and thoroughly analyzed by commentators. Because the pervasive confusion in the lower courts is traceable to language in this Court's own decisions, only this Court can provide clarity. This Court has already determined that the issue warrants its attention by granting review in a previous case ultimately resolved on other grounds. The issue is even more important today, given the widening of the conflict in the intervening years and the potential for the California Supreme Court's deeply flawed decision to undermine this Court's recent

jurisdictional teachings and sow confusion and unpredictability.

Without further clarification or refinement by this Court, "relates to" is simply not a predictable or determinate standard. This Court has recognized the breadth and fundamental indeterminacy of that phrase or its equivalent in other settings, such as ERISA's preemption clause and RICO. Moreover, as understood by the court below, the "substantial connection" test imposes no more meaningful or predictable limits on relatedness. In particular, the lower court's "same product" rationale is open-ended and overlooks the fundamental regulatory and economic reasons why most manufacturers, both large and small, make uniform products. And the "nationwide advertising" rationale is potentially far-reaching given the ubiquitous use of social media and the internet today by companies of all sizes. The lower court's use of a "sliding scale" to measure whether a "substantial connection" exists only compounds the indeterminacy and unpredictability.

II. The issue presented here arises with great frequency and is surpassingly important to both small and large product manufacturers as well as other civil defendants. Most states have long-arm statutes that reach as far as due process permits, and by last count the "minimum contacts" issue is adjudicated in more than a thousand state and federal decisions each year. The nexus requirement is a component of every case involving specific jurisdiction, and such cases will only become more numerous in light of this Court's recent clarification of the limits on general jurisdiction.

The issue is also enormously significant for other reasons. It involves the due process rights of civil defendants. It also involves a fundamental question of federalism and interstate comity concerning the adjudicative authority of the states. Beyond that, personal jurisdiction issues are often case-dispositive. And if allowed to stand, the decision below will make the California courts a magnet for all sorts of product liability litigation involving U.S. and foreign manufacturers, both large and small. Finally, the jurisdictional overreach by the California Supreme Court, if left uncorrected, may trigger reciprocal treatment of American companies by other countries.

## ARGUMENT

### I. THIS COURT SHOULD RESOLVE THE SERIOUS CONFLICT AND CONFUSION IN THE LOWER COURTS OVER A CRUCIAL DUE PROCESS LIMITATION ON SPECIFIC JURISDICTION

The Due Process Clause prohibits a court from exercising personal jurisdiction unless the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). That proscription "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985)

(quoting *World-Wide Volkswagen*, 444 U.S. at 297). This Court's "minimum contacts" test thus serves to ensure that a defendant has fair warning that a decision to engage in particular activities may subject it to the jurisdiction of a foreign sovereign.

Clear rules are a virtue in most areas of the law. But they are essential with respect to personal jurisdiction, where predictability and fair notice are required by due process. This case presents the Court with an opportunity to dispel serious confusion – and resolve longstanding conflicts – in the lower courts about an issue that arises with surpassing regularity: the meaning of the "nexus" requirement in cases involving specific jurisdiction.

### A. There Is Widespread Confusion Concerning The Meaning Of The Nexus Requirement

As the petition demonstrates (Pet. 11-14), there is an entrenched conflict in the lower courts over how the questions identified (but reserved) by this Court in *Helicopteros* (see page 3, *supra*) should be answered. Courts have developed at least three different approaches to evaluating whether a plaintiff's claims "arise out of or relate to" a defendant's forum contacts. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 & nn.8-9 (1984). As explained above (at 3-4), a conflict in the circuits already existed when this Court granted review in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1990).

That conflict has significantly deepened in the intervening years. Thus, as petitioner shows, the

Fourth and Tenth Circuits and the highest courts of Arizona, Massachusetts, and Washington have now joined the Ninth Circuit in the "but for" camp. Pet. 11-12 (citing cases). At the same time, the Third, Seventh, and Eleventh Circuits and the Oregon Supreme Court have now joined the First Circuit in adopting proximate cause as the governing test. See *id.* at 12-14 (same). Even more troubling, a third group of courts – including the Federal Circuit and the highest courts of California, Texas, and the District of Columbia – have beaten a new path by adopting an even more amorphous "substantial connection" or "discernible relationship" test that can be satisfied in the absence of *any* causal relationship ("but for" or proximate) between defendant's forum contacts and plaintiff's claims. See Pet. 14-15 (discussing cases). Some of these decisions – like the 4-3 decision below – have been rendered by sharply divided courts. *E.g.*, *Shoppers Food Warehouse* v. *Moreno*, 746 A.2d 320 (D.C. 2000) (en banc) (4-3).[4]

Courts and commentators alike have recognized the serious conflict in the lower courts over the meaning of the nexus requirement. See, *e.g.*, *Tamburo* v. *Dworkin*, 601 F.3d 693, 708 (7th Cir. 2010) (noting "conflict among the circuits"); *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 318-20 (3d Cir. 2007) (noting "lack [of] any consensus" and describing "[t]hree approaches"); 1 BUSINESS AND

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[4] These conflicts include multiple instances in which a state's highest court has taken a position that differs from the circuit in which that state is located. This Court has not hesitated to address conflicts of this kind to prevent forum-shopping. See, *e.g.*, *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985).

COMMERCIAL LITIGATION IN THE FEDERAL COURTS § 2:25, at 136-37 (2011) ("Without guidance from the Supreme Court, the circuit courts have developed different approaches."). They have also bemoaned this Court's failure to revisit the issue granted in *Shute*. See, *e.g.*, *O'Connor*, 496 F.3d at 318 ("Unfortunately, the Supreme Court has not yet explained the scope of this requirement."); *Thomason* v. *Chemical Bank*, 661 A.2d 595, 599-600 (Conn. 1995) (noting that this Court has required a nexus, but not "articulated a standard" for determining it).

Significantly, this issue originally arose because of *language in this Court's own decisions*. In *Helicopteros*, this Court first used the disjunctive formulation, "arise out of *or* relate to," while simultaneously indicating there might not be any difference between those two phrases. See page 3, *supra*. Given these roots of the lower courts' confusion, only this Court can provide clarity and restore uniformity to this important area of federal law.

### B. Without Further Clarification Or Refinement By This Court, "Relates To" Is Not A Meaningful Or Predictable Standard

The "arising out of" formulation of the nexus requirement plainly requires a causal relationship (whether proximate or "but for") between the defendant's forum contacts and the plaintiff's claims. In contrast, "relates to" is, on its face, unclear. Although the Court in *Helicopteros* suggested that "relates to" might well *mean the same thing in this setting* as "arising out of," many lower courts have assumed otherwise.

This Court should act now to rectify this situation. Without further refinement or clarification, "relates to" cannot possibly serve as a standard that provides the requisite fair notice or "degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (internal quotations omitted).

In other settings, this Court has recognized the fundamental indeterminacy of the phrase "relates to." Thus, in cases involving ERISA preemption, the Court has observed that the words "relate to" (see 29 U.S.C. § 1144(a)) are not only "clearly expansive" but also ultimately "indetermina[te]" because "'really, universally, relations stop nowhere[.]'" *De Buono* v. *NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 813 (1997) (quoting H. JAMES, RODERICK HUDSON, at xli (1980)); see also *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., joined by Ginsburg J., concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, *everything is related to everything else.*") (emphasis added). Because of the inherent vagueness of "relatedness," some Justices have also criticized the decision to adopt from the legislative history of RICO the phrase "continuity plus relationship" as a way of understanding the meaning of the statutory term "pattern of racketeering activity." See *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 252 (1989) (Scalia, J., joined by Rehnquist, C.J.,

O'Connor and Kennedy, JJ., concurring in the judgment) ("This seems to me about as helpful to the conduct of [the lower courts'] affairs as 'life is a fountain.'"). Here, of course, the "relates to" language comes from this Court's own decisions, which again is why only the Court can provide the much-needed clarification.

### C. The "Substantial Connection" Test Used Below Imposes No Meaningful Or Predictable Limits On Relatedness

As expansively understood by the California Supreme Court, the "substantial connection" test is no less indeterminate than "relates to." A "connection" is simply a synonym for a "relationship." What does "substantial" mean? The only guidance provided by the majority below was to say, relying on an earlier California Supreme Court decision, that defendant's forum contacts cannot be "random." Pet. App. 27a. That is tantamount to saying there must be some "connection" or "relationship" between the forum contacts and the claims. At bottom, this understanding of "substantial" does not meaningfully narrow the field, as is confirmed by the majority's discussion of Bristol-Myers's contacts with California that supposedly formed a "substantial" connection to respondents' claims.[5]

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[5] Although this Court occasionally has used the words "substantial connection" in its personal jurisdiction cases, it has not used that formulation as a standalone test (and in any event has given those words a limiting construction). *E.g.*, *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121-22 (2014) (stating that connection "must *arise out of* contacts that the defendant

The lower court relied heavily on the fact that the "same allegedly defective product" that was prescribed and sold in other states to respondents (who then allegedly suffered injuries in those other states) was *also* sold in California to other persons. Pet. App. 28a; see also *id.* at 32a (noting that Bristol-Myers has "enjoyed sizeable revenues from the sales of its product here – *the very product* that is the subject of the claims") (emphasis added). But that is hardly a "substantial" connection to *respondents'* legal claims. Instead, it reflects basic regulatory and legal facts as well as market realities. Today, many highly regulated products in the United States (including prescription drugs such as Plavix, medical devices, and generic drugs) are subject to premarket approval or clearance processes administered by federal agencies that leave manufacturers with little or no freedom to make changes to the design, manufacture, and labeling of the product approved by the agency.[6] Still other products, such as automobiles,

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*himself* creates with the forum") (emphasis altered; internal quotations omitted).

[6] See, *e.g.*, *Wyeth* v. *Levine*, 555 U.S. 555, 566-68 (2009) (discussing FDA's role in granting "premarket approval of new drugs" based on manufacturer's showing that specific compound is safe and effective for its intended uses, and noting that FDA's "approval of a new drug application includes the approval of the exact text in the proposed label"); *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 612-14 & n.2 (2011) (generic drug must be equivalent to brand-name drug and must use same labeling); *Riegel* v. *Medtronic*, 552 U.S. 312, 319 (2008) ("Once a device has received premarket approval, [federal law] forbids the manufacturer to make, without FDA permission, changes in

are subject to extensive federal regulations even if not premarket approval or clearance. These regulatory requirements are the principal reason why the "same product" (Plavix) is sold by Bristol-Myers in other states.

Moreover, even where product uniformity does not flow from regulatory requirements, it is usually necessitated by economic efficiencies and rational production processes. This is equally true for large manufacturers and tiny "mom-and-pop" producers. Few product makers in today's economy sell only bespoke or custom-made goods. The lower court's "same product" rationale for finding a "substantial connection," if left undisturbed, could be used to force even small manufacturers to defend lawsuits in distant fora based on uniform products having been sold to consumers there, even where the plaintiff's claims have nothing to do with sales, marketing, or injuries occurring in that forum.

Equally open-ended is the "nationwide advertising" rationale for finding a "substantial connection." See Pet. App. 33a (emphasizing that Bristol-Myers engaged in a "single nationwide marketing and distribution effort"); *id.* at 28a ("nationwide marketing, promotion, and distribution of Plavix"). As explained above, certain products require uniformity in warnings and instructions because that is what is required by the FDA or other federal agencies. Beyond that, in this day of wide-

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design specifications, manufacturing processes, labeling, or any other attribute, that would affect safety or effectiveness.").

spread internet (and social media) advertising, there is nothing to prevent courts applying the California Supreme Court's expansive approach from pointing to the existence of a company website, Facebook page, or Twitter feed as the basis for finding the requisite "national advertising" campaign. *Nicastro*, 564 U.S. at 888-90 (Breyer, J., joined by Alito, J., concurring) (expressing concern over how jurisdictional standards might be applied to a company that "targets the world by selling products from its Web site" or "markets its products through popup advertisements that it knows will be viewed in a forum"). That cannot be the law.

### D. A "Sliding Scale" Only Compounds The Indeterminacy And Lack Of Predictability

The California Supreme Court embedded its expansive understanding of the "substantial connection" test in an overall approach that called for a "sliding scale." Thus, the majority explained that there is an "inverse[]" relationship between (i) the intensity of a defendant's forum contacts, and (ii) the degree of connection of the plaintiff's claim to those contacts. Pet. App. 22a, 25a. Under that approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Id.* at 22a.

Thus, the California courts have made clear that the "substantial connection" test's limits may be jettisoned if a defendant has "wide ranging" but unrelated contacts with the state. In other words, what qualifies as a "substantial connection" to the

plaintiff's claims in one case (where a defendant has numerous wholly unrelated forum contacts) will *not* qualify as a "substantial connection" in another (where a defendant has few or none).

This approach is problematic. As the Third Circuit has correctly observed in rejecting the "sliding scale," such an approach "allow[s] courts to vary the scope of the relatedness requirement according to the quantity and quality of the defendant's [forum] contacts," with the result being "a freewheeling totality-of-the-circumstances test." *O'Connor*, 496 F.3d at 321 (internal quotations omitted). Under a sliding-scale approach, "[u]nbounded judicial intuition replaces structured analysis, and its application from case to case necessarily defies prediction." *Id.* at 322. See Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 366 (2005) (sliding scale "severely weakens the defendant's ability to anticipate the jurisdictional consequences of its conduct"). "A standard so formless has no place in [the] relatedness inquiry." *O'Connor*, 496 F.3d at 322.[7]

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[7] Notably, this case is a better vehicle than *Shute* for addressing the nexus requirement. In *Shute*, the Court was asked to choose between the causation-based standards that had been developed to date. Since jurisdiction there could be exercised under a "but for" standard, *Shute* provided no occasion to address non-causation-based standards (much less those embedded in a sliding scale), and in any event those other approaches had yet to be developed. The petition in this case asks this Court to address a more fundamental question that does not necessarily require any choice between causation-based standards: May specific jurisdiction be exercised over a defendant whose forum contacts have *no* causal connection to

### E. The Decision Below Ignores And Undermines This Court's Recent Teachings

As explained above (at 4-5), this Court in recent years has issued a series of decisions aimed at preserving the essential distinction between general and specific jurisdiction and clarifying the limits on both. The decision below is inconsistent with, and undermines, certain aspects of these decisions.

In *Daimler* and *Goodyear*, this Court took pains both to clarify the standards governing general jurisdiction and to correct lower-court jurisdictional decisions that were "unacceptably grasping" (*Daimler*, 134 S. Ct. at 761) or had "[c]onfus[ed] or blend[ed] general and specific jurisdictional inquiries." *Goodyear*, 564 U.S. at 919. In *Goodyear* and *Nicastro*, the Court clarified certain limits on the "stream of commerce" theory, which is typically deployed by courts in cases involving product liability claims. For example, *Goodyear* made clear that the "stream of commerce" theory cannot be used as a basis for general jurisdiction. See 564 U.S. at 919-20, 926-29.

The Court's unanimous opinion in *Goodyear* also reflected the well-understood limits on the "stream of commerce" theory. "Because the episode-in-suit, the bus accident, occurred in France," the Court reasoned, "and the tire alleged to have caused the

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the plaintiff's claims? At the same time, the question presented is broad enough to allow the Court to choose from among the conflicting standards if it wishes to do so.

accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy." *Id.* at 919. As Bristol-Myers points out (Pet. 23-25 & n.3), this reasoning in *Goodyear* suggests "a simple rule for specific jurisdiction in a product-defect case: If the plaintiff is not injured in the forum and the allegedly defective product was not manufactured or sold in the forum, then there is no specific jurisdiction in the forum." Pet. 24.

The decision below departs from that clear principle and thus effectively circumvents long-settled limits on "stream of commerce" jurisdiction. In so doing, it creates greater uncertainty for product manufacturers. *Goodyear*'s clear rule, in contrast, provides a certain degree of predictability. If a manufacturer knows that it will be subject to specific jurisdiction over product liability claims involving a particular product only in a state where it has manufactured or sold that product, and then only for the products actually sold or manufactured there that caused injury in the state, it can make an informed decision about whether and to what extent to manufacture in (or sell directly into) the state. Under the California Supreme Court's approach, in contrast, the decision to forbear manufacturing or selling a product in a state may afford little protection if the defendant has substantial other (but unrelated) activities there.

Nor is this all. As the dissenters below correctly pointed out (Pet. App. 50a-51a), the majority's approach "undermines" the "essential distinction between specific and general jurisdiction" as articu-

lated in both *Daimler* and *Goodyear*. The nexus requirement, after all, "is the divining rod that separates specific jurisdiction cases from general jurisdiction cases." *Nowak* v. *Tak How Investments, Ltd.*, 94 F.3d 708, 714 (1st Cir. 1996) (internal quotations omitted). This Court granted review in *Goodyear* to address a lower court decision that "[c]onfus[ed] or blend[ed] general and specific jurisdictional inquiries" (564 U.S. at 919). It should do so here as well.

## II. THE QUESTION PRESENTED IS RECURRING AS WELL AS CRITICALLY IMPORTANT TO PRODUCT MANUFACTURERS BOTH LARGE AND SMALL

### A. The Issue Arises With Great Frequency

The federal due process limits on personal jurisdiction are a frequent subject of litigation in both state and federal courts. Most states have long-arm statutes that reach as far as the Due Process Clause permits. See McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 525-30 (2004) (32 of 50 states). In those jurisdictions (and in the countless federal cases where such state long-arms are applied), the reach of the state's long-arm statute and the outer limits of the Due Process Clause present the same question. And even in states where long-arm statutes do not by their terms (or as construed) extend as far as due process permits, due process challenges (which can include those based on the nexus requirement) are frequently brought to assertions of jurisdiction.

It should come as no surprise, then, that issues of personal jurisdiction (and in particular questions concerning this Court's "minimum contacts" test) have been described as "one of the most litigated issues in state and federal courts." Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 & n.5 (1995) (noting that more than 2,300 cases involving "minimum contacts" test were decided in 1990-95); Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 108 & n.16 (2102) (noting 5,767 such cases in 2007-12). This Court's recent decisions in *Daimler* and *Goodyear*, which underscore the important limits on *general* jurisdiction, will no doubt ensure that questions concerning *specific* jurisdiction will arise with even greater frequency in the future. And because the nexus requirement is a part of the basic test for specific jurisdiction, it arises with great regularity, not just as here in product liability cases but in a wide range of civil litigation.

### B. The Issue Is Enormously Significant

The meaning of the nexus requirement is frequently litigated and involves the fundamental due process rights of civil defendants. As next explained, there are at least four additional reasons why the question presented is important to product manufacturers, both large and small (including PLAC's members), as well as to other defendants.

*First*, issues of personal jurisdiction are often case-dispositive. That is certainly true here. Had the California Supreme Court applied either the proximate cause or "but for" test in evaluating the nexus between Bristol-Myers's California contacts

and respondents' legal claims, those claims would have been dismissed for lack of personal jurisdiction.

*Second*, if the decision below is allowed to stand, the California state courts predictably will become a magnet for all sorts of product-related litigation involving large national manufacturers of non-customized products, even in situations where the plaintiff, the product sale, and the alleged injury have no connection whatsoever to that state. Because large manufacturers such as Bristol-Myers are quite likely to have substantial assets, employees, or operations in a state as large and important as California (even if, as here, they represent a small fraction of the company's U.S. footprint), many such companies that clearly are not "at home" in California (*Daimler*, 134 S. Ct. at 760) may nonetheless be subject to lawsuits unrelated to their California contacts under the logic of the decision below. Indeed, given the potentially far-reaching sweep of the "same product" and "national advertising" rationales, even very small manufacturers without any significant assets or operations in California might well be found to have a "substantial connection" to the state if those manufacturers' (a) uniform products are sold to California consumers, and (b) social-media advertising or a website is accessed there. And the California Supreme Court's approach, if used by *other* courts, will create similar litigation magnets for plaintiffs in other fora.

*Third*, the importance of the issue goes beyond the potential for distortions in the civil justice system, forum-shopping, and unfairness to certain defendants. At bottom, the nexus requirement raises

a fundamental question of *federalism and interstate comity*, namely, whether one state may import a cause of action that another state ought by custom and right have the power to resolve in its own courts. See *World-Wide Volkswagen*, 444 U.S. at 291-94 (Due Process Clause in this setting "act[s] as an instrument of interstate federalism"; minimum contacts inquiry serves "to ensure that the States[,] through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); *Hanson* v. *Denckla*, 357 U.S. 235, 250-51 (1958) (constitutional restrictions on personal jurisdiction are "more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."). Preserving these foundational lines between the power of one sovereign state and another is uniquely a function of this Court. Review should be granted to enforce this federalism principle by reining in California's jurisdictional overreach.

*Fourth*, the issue is important to U.S. manufacturers and other businesses, both large and small, because of the possibility that *other countries* will reciprocate by adopting the same far-reaching approach employed by the California Supreme Court. The international community has long lamented what it has regarded as lax U.S. rules regarding personal jurisdiction. See *Daimler*, 134 S. Ct. at 763; Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 173 (2001). If those rules are further diluted by an approach that is expansive and blurs the bedrock distinction between specific and general jurisdiction,

other countries may follow suit by making it much easier for U.S. companies, both large and small, to be haled into foreign courts to answer for claims bearing no causal relationship to activities in those countries. Indeed, many nations have enacted reciprocity measures authorizing their courts to exercise jurisdiction over a foreign defendant if that defendant's home country would assert jurisdiction in the same situation. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 15 (1987). These significant "[c]onsiderations of international rapport" (*Daimler*, 134 S. Ct. at 763) underscore the importance of the issue presented in this case.

## CONCUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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NOVEMBER 2016

# APPENDIX

**PRODUCT LIABILITY ADVISORY COUNCIL, INC.**
**LIST OF CORPORATE MEMBERS**

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3M
Altec, Inc.
Altria Client Services LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
The Boeing Company
Bombadier Recreational Products, Inc.
Boston Scientific Corporation
Bridgestone Americas, Inc.
Bristol-Myers Squibb Corporation
C.R. Bard, Inc.
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chevron Corporation
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
The Dow Chemical Company
E.I. duPont de Nemours and Company
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General Motors LLC
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GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Hankook Tire America Corp.
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Intuitive Surgical, Inc.
Isuzu North America Corporation
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Kawasaki Motors Corp., U.S.A.
KBR, Inc.
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Lincoln Electric Company
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Medtronic, Inc.
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Novo Nordisk, Inc.
Pella Corporation
Pfizer Inc.
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Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
The Sherwin-Williams Company
St. Jude Medical, Inc.
Stryker Corporation
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
Teleflex Incorporated
Toyota Motor Sales, USA, Inc.
Trinity Industries, Inc.
U-Haul International
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digital Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
ZF TRW
Zimmer Biomet

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV 10 2016
OFFICE OF THE CLERK

No. 16-466

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, *et al.*

*Respondents.*

**On Petition for a Writ of Certiorari to the California Supreme Court**

## BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

The Due Process Clause permits a state court to exercise specific jurisdiction over a defendant only when the plaintiff's claims "arise out of or relate to" the defendant's forum activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted). The question presented is:

Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims—that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts.

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## INTERESTS OF *AMICI CURIAE*

Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared frequently in this and other federal courts in cases involving personal jurisdiction issues, to support defendants seeking to avoid being subject to a court's coercive powers when assertion of jurisdiction does not comply with traditional notions of fair play and substantial justice. *See, e.g., BNSF Railway Co. v. Tyrrell*, No 16-405 (U.S., petition docketed, Sept. 28, 2016); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Novo Nordisk A/S v. Lukas-Werner, cert. denied*, 134 S. Ct. 423 (2013). WLF also filed a brief in support of Petitioner when this case was before the California Supreme Court.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of their intent to file. All parties have consented to the filing; letters of consent have been lodged with the Court.

as *amicus curiae* in this Court on a number of occasions.

In its seminal decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the Court made clear that the courts of a State lack personal jurisdiction over a corporate defendant unless its activities within the State give rise to the claims being asserted or unless the corporation is "at home" within the forum State. *Daimler* further clarified that a corporation, even one that conducts substantial business in all 50 States, should be deemed "at home" in no more than one or two of the States. *Amici* are concerned that the rationale of the California Supreme Court, unless overturned by this Court, would essentially negate *Daimler* as an effective check on state court jurisdiction over out-of-state corporate defendants. *Amici* are further concerned that the decision below deprives businesses of adequate means to structure their conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

## STATEMENT OF THE CASE

Like many corporations that sell products nationwide, Petitioner Bristol-Myers Squibb Co. ("BMS") sells a large number of products in California. For example, BMS's Plavix sales in California between 2006 and 2012 totaled nearly $1 billion. This case addresses whether those substantial sales are sufficient to justify California's exercise of jurisdiction over claims filed by nonresidents who allege that their purchase and use of Plavix—and their alleged injury from such use—all occurred outside California.

A State's exercise of personal jurisdiction over a corporation based on business activity within the State that is not directly related to events giving rise to the litigation is often referred to as an exercise of "general jurisdiction." *Daimler* made clear that a State may not exercise general jurisdiction over a corporation when, as here, the corporation is neither incorporated in nor has its principal place of business within the State, even when the corporation has substantial sales within the State. This case addresses whether nonresidents may nonetheless invoke the California courts' personal jurisdiction over such a corporation by citing those very same substantial sales as the basis for "specific jurisdiction."

These products liability actions involve allegations that consumers from across the nation suffered injuries after taking Plavix, a drug approved by the Food and Drug Administration (FDA) for use in preventing dangerous blood clots. A total of 661 plaintiffs—86 California residents and 575 nonresidents—joined together to file eight separate complaints against BMS in March 2012 in San Francisco Superior Court.[2] The 575 nonresident plaintiffs claim no contacts with BMS's California activities or with California generally. Moreover, although BMS derives substantial revenue from

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[2] The decision by plaintiffs' lawyers to file eight separate complaints (each with fewer than 100 plaintiffs) was not coincidental. Had any of the complaints included 100 or more plaintiffs, BMS's right to remove that complaint to federal court under the Class Action Fairness Act (CAFA) would have been beyond question. *See* 28 U.S.C. § 1332(d)(11)(B)(i) (authorizing removal of a "mass action" in which the monetary claims of "100 or more persons are proposed to be tried jointly.").

California sales, those sales represent but a small fraction of BMS's overall sales, and California is not the State in which BMS is incorporated (Delaware), not the State in which it maintains its principal place of business (New York), and not even one of the States in which Plavix is manufactured.

The California Supreme Court nonetheless held that California could maintain personal jurisdiction over BMS with respect to the claims not only of the 86 California residents (an issue that BMS does not contest) but also with respect to the 575 nonresident plaintiffs (the "Respondents").

When the case first came before the California Court of Appeal, it summarily denied BMS's writ petition (seeking review of the superior court's conclusion that it could exercise general jurisdiction over BMS based on the company's substantial business activity in California). Following the 2014 *Daimler* decision, the California Supreme Court directed the appeals court to address the merits of BMS's petition. It did so, and concluded that although *Daimler* precluded assertion of *general* jurisdiction over BMS with respect to the claims of the nonresident defendants, California courts could still assert *specific* jurisdiction over BMS. Pet. App. 91a-146a.

A sharply divided California Supreme Court affirmed. Pet. App. 1a-90a. The four-justice majority recognized that the Due Process Clause bars California courts from exercising specific jurisdiction over BMS unless Respondents can demonstrate that their claims "arise out of or are related to [BMS's] forum-related activities." Pet. App. 20a-21a. While it did not assert

that the claims of Respondents "arise out of" any of BMS's California-based activities, the majority concluded that BMS's activities were sufficiently "related to" those claims to warrant the exercise of personal jurisdiction. *Id.* at 25a-35a.

The majority held that, in order to satisfy the "related to" requirement, "the defendant's activities in the forum state need not be either the proximate cause or the 'but for' cause of the plaintiff's injuries." *Id.* at 22a. Instead, in accord with prior California Supreme Court case law, the majority held that it is sufficient to demonstrate "a substantial nexus or connection between the defendant's forum activities and the plaintiff's claims." *Id.* at 21a. It elaborated:

> Under the substantial connection test, the intensity of forum contacts and the connection of the claim to those contacts are inversely related. The more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim. Thus, a claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Indeed, only when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that contact.

*Id.* at 22a (citations omitted).

The majority acknowledged that Respondents were not injured by Plavix in California, were not

treated in California, were not prescribed Plavix by California doctors, and did not have their prescriptions filled by California pharmacists. It further acknowledged that BMS neither developed nor manufactured Plavix in California, and that the distribution chain for the Plavix supplied to Respondents did not pass through California. The majority based its "substantial connection" finding on evidence that BMS: (1) extensively marketed Plavix to California residents as part of a nationwide marketing program; (2) contracted with McKesson Corp. (a California corporation) to distribute Plavix and hired several hundred salespersons within the State; and (3) maintains facilities in California that conduct research and development of other BMS products (but not Plavix). *Id.* at 32a.

Justice Werdegar, joined by Justices Chin and Corrigan, dissented. Pet. App. 46a-87a. He concluded, "*[T]he record contains no evidence connecting the Plavix taken by any of the nonresident plaintiffs to California.*" *Id.* at 47a (emphasis in original). He argued that the majority's conclusion that California could exercise jurisdiction over BMS in connection with Respondents' claims was based on a specific-jurisdiction standard that conflicts with the standard adopted by this Court and numerous other appellate courts. *Id.* at 51a-77a. He warned that the decision interferes with rational business planning by undermining the ability of businesses to predict the types of litigation to which they expose themselves when they decide to undertake activities within a State. *Id.* at 79a-80a.

## SUMMARY OF ARGUMENT

The petition raises an issue of exceptional importance. As this Court has repeatedly reminded, the Fourteenth Amendment's Due Process Clause imposes strict limits on the authority of a state court to exercise personal jurisdiction over out-of-state defendants. *See, e.g., J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter."). Those limitations serve both to protect litigants from inconvenient or distant litigation and to recognize limits on the sovereignty of each State with respect to affairs arising in other States. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980). The decision below threatens to obliterate those limitations by subjecting out-of-state defendants to the jurisdiction of California courts based on activities lacking any connection to California.

As Petitioner has demonstrated, review is warranted to resolve the direct and long-standing conflict—between the California Supreme Court and numerous federal appeals courts as well as other state supreme courts—regarding the scope of specific jurisdiction. In adhering to its "substantial nexus or connection" test, the court below explicitly disclaimed any requirement that the defendant's activities in the forum State be the "proximate" cause, or even the "but for" cause, of the plaintiffs' injuries. Pet. App. 22a. That holding directly conflicts with the numerous appellate decisions, cited in the petition, that have concluded that a plaintiff's claims do not "arise out of or relate to" the defendant's forum activities unless

those forum activities are at least a "but for" cause of the alleged injuries.

*Amici* will not repeat those citations here. It suffices to say that WLF fully agrees with BMS's contention that review is warranted to resolve the conflict between the California Supreme Court and numerous other appellate courts regarding when the plaintiff's claims can be said to "arise out of or relate to" the defendant's forum activities. *Amici* write separately to focus on two other points.

First, review is also warranted to resolve the substantial conflict between the decision below and this Court's personal-jurisdiction decisions. The Court's decisions have never suggested that specific jurisdiction is appropriate when, as here, the only relationship between the plaintiffs' claims and the defendant's forum activities is a similarity of subject matter, and when none of those forum activities played any role in bringing about the plaintiffs' alleged injuries. As the Court stated categorically in a recent specific-jurisdiction case, for a court to exercise personal jurisdiction consistent with due process, "the defendant's *suit-related conduct* must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (emphasis added). Respondents have not pointed to any "suit-related conduct" by BMS that is connected to California. Indeed, if the conduct to which Respondents point—principally, BMS's substantial general business activity within California—suffices to create specific jurisdiction with respect to their claims, then the due-process limitations imposed by *Daimler* on the scope of general jurisdiction will be rendered a dead letter.

Second, review is warranted because the petition provides an exceptionally good vehicle for resolving the personal-jurisdiction issue over which the lower courts are so sharply conflicted. The facts of this case are largely uncontested. The only dispute involves what due-process test should be applied to the undisputed facts. The California Supreme Court has expressly disavowed adoption of a proximate-cause or "but for" cause standard, in sharp contrast to the many appeals courts that have held that specific jurisdiction is unwarranted unless one or both of those standards are satisfied. And that conflict is outcome-determinative; *amici* do not understand Respondents to be arguing that BMS's California-based activities are even a "but for" cause of their injuries.

The important role played by California in the national economy also makes this an ideal vehicle for resolving the conflict among lower-court decisions. Given the size of the California market, any company that aspires to conduct business on a nationwide basis has no choice but to conduct business in California. Yet, California courts have become a particularly attractive destination for forum-shopping plaintiffs' lawyers in search of courts thought to exhibit a pro-plaintiff bias. Granting review in this case will resolve the conflict in the context of a jurisdiction that plays an increasing and outsized role in resolving disputes between consumers and product manufacturers.

While the conflict among the lower courts regarding when a plaintiff's claims "arise out of or relate to" the defendant's forum activities has festered for decades, it has come more sharply into focus following the 2014 *Daimler* decision. Before *Daimler*,

many lower courts asserted *general* jurisdiction over out-of-state companies based on a finding that the company engaged in a substantial, continuous, and systematic course of business within the forum State. As the court below recognized, *Daimler* held that such assertions of general jurisdiction are "unacceptably grasping" and are inconsistent with due process principles. Pet. App. 15a (citing *Daimler*, 134 S. Ct. at 761). As a result, lower courts have been forced to grapple with increasing frequency with claims that a defendant's substantial forum contacts are nonetheless sufficient to justify assertion of jurisdiction over an out-of-state defendant based on a *specific*-jurisdiction theory. Review is warranted to provide the lower courts with desperately needed guidance regarding how to resolve such claims.

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S SPECIFIC-JURISDICTION DECISIONS

As this Court has long recognized, the Due Process Clause of the Fourteenth Amendment limits the authority of state courts to exercise personal jurisdiction over nonresident defendants that do not voluntarily consent to jurisdiction. *See, e.g.*, *J. McIntyre Machinery*, 564 U.S. at 881 (plurality) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter."). A state court may exercise personal jurisdiction over a nonresident defendant only if there exist "minimum contacts" among the defendant, the litigation, and the

forum state. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The "minimum contacts" requirement serves two important functions: it protects the defendant from being required to defend a lawsuit in an inconvenient forum and it "acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292.

The Court has consistently held that a state court may not exercise personal jurisdiction over an out-of-state defendant simply because the defendant has engaged in continuous and systematic activities within the State. Rather, personal jurisdiction also requires a showing that the defendant's activities are sufficiently connected to the claim. *See, e.g.*, *Daimler*, 134 S. Ct. at 757 ("a corporation's 'continuous activity of some sort within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity'") (quoting *Int'l Shoe*, 326 U.S. at 318); *Shaffer*, 433 U.S. at 204 ("the central concern of the inquiry into personal jurisdiction" is "the relationship among the defendant, the forum, *and the litigation*") (emphasis added). As *Daimler* explained, personal jurisdiction may not be exercised over nonresident defendants based on claims "having nothing to do with anything that occurred or had its principal impact in" the forum state. *Daimler*, 134 S. Ct. at 762.

A defendant is generally required to answer any and all claims asserted in its "home" jurisdiction, even if the claim bears no relationship to the jurisdiction.

The Court refers to an assertion of personal jurisdiction where the defendant is "at home" as an exercise of "general jurisdiction." *Goodyear*, 564 U.S. at 919. *Daimler* made plain, however, that an assertion of general jurisdiction over a corporation can be sustained in only two places: the State in which a corporation maintains its principal place of business and the State of incorporation. 134 S. Ct. at 760. In *Daimler*, the Court rejected the plaintiffs' request that it approve "the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business," characterizing the plaintiffs' proposed formulation as "too grasping." *Id.* at 761.

It is undisputed that BMS is not subject to general jurisdiction in California. It is not incorporated in California, nor does it maintain its principal place of business in the State. Thus, for the California courts to properly exercise personal jurisdiction over BMS with respect to each of the tort claims asserted by Respondents, it must do so on the basis of "specific jurisdiction"—that is, a showing that each claim "arises out of or relates to the defendant's contacts with the forum." *Id.* at 754.

### A. The Court's Case Law Establishes that Respondents' Claims Do Not Arise out of or Relate to BMS's Contacts with California

In concluding that Respondents' claims "arise out of or relate to" BMS's contacts with California, the California Supreme Court principally relied on

evidence that BMS markets Plavix on a nationwide basis and that its California marketing efforts are similar to the allegedly misleading Plavix marketing efforts undertaken by BMS in each of Respondents' home States. Pet. App. 28a. The court concluded that Respondents' claims:

> [A]re based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product [as asserted by other, California-based plaintiffs], which allegedly caused injuries in and outside the state. Thus, the nonresident plaintiffs' claims bear a substantial connection with BMS's contacts in California.

*Ibid.*

In other words, as far as the California Supreme Court is concerned, the requisite minimum contacts among BMS, the forum, and the litigation can be established even when, as here, "the nonresident plaintiffs' claims would be exactly the same if BMS had no contact whatever with California." *Id.* at 29a. The court rejected BMS's argument that the existence of a nationwide Plavix marketing campaign was insufficient "to establish relatedness for purposes of minimum contacts," stating that that argument "rest[ed] on the invalid assumption that BMS's forum contacts must bear some substantive legal relevance to the nonresident plaintiffs' claims." *Id.* at 30a.

Yet, the assumption that the court deemed "invalid"—that the defendant's forum contacts must

"bear some legal relevance" to the plaintiffs' claims in order to satisfy the "arise out of or relate to" requirement—is an assumption that has underpinned every one of this Court's specific-jurisdiction decisions.

Thus, for example, in determining whether California courts could exercise specific jurisdiction over Florida residents in connection with a libel claim asserted by a California resident, the Court focused its inquiry solely on forum contacts that were legally relevant to the libel claim. *Calder v. Jones*, 465 U.S. 783 (1984). The defendants were the writer and editor of an article that was widely circulated by the *National Enquirer* in California. Although the defendants were responsible for numerous other articles that were circulated in California, the only forum contacts upon which the Court relied were those related to the article that allegedly defamed the plaintiff: "petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis." *Id.* at 790. But under the California Supreme Court's expansive understanding of specific jurisdiction, the defendants' authorship of articles directed at *other* California residents would have been sufficient by itself to satisfy minimum-contact requirements.

Similarly, in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), the Court determined that the defendant's numerous contacts with the forum State (Texas) were insufficient to permit Texas to exercise personal jurisdiction because those contacts did not arise out of or relate to the plaintiffs' claims (which involved injuries arising from

a helicopter crash in Peru). Yet the decision almost surely would have come out the other way under the specific-jurisdiction standard adopted by the California Supreme Court.

Although the ill-fated helicopter services were not provided in Texas, the defendant engaged in numerous helicopter-related activities within the State, including: (1) purchase of its helicopters and spare parts within Texas; (2) sending its pilots to Texas for flight training; (3) regularly sending employees to Texas to consult with the helicopter manufacturer; (4) sending its chief executive officer to Houston to negotiate the helicopter service contract with the plaintiffs' employer; and (5) accepting checks written by the Texas-based employer and drawn on a Texas bank. None of those Texas-based activities had any "legal relevance" to the plaintiffs' claims that the defendant operated its helicopter in a negligent manner. But because the California Supreme Court does not deem "legal relevance" a prerequisite for establishing specific jurisdiction under its "significant nexus or connection" test, those numerous forum contacts (all of which related to the defendant's helicopter operations) seemingly would have been more than sufficient for the California Supreme Court to uphold personal jurisdiction.

Most recently, the Court held that a Nevada court lacked specific jurisdiction over claims against a DEA agent arising from his seizure of cash at the Atlanta airport from a Nevada resident about to board a flight home to Nevada. *Walden v. Fiore*, 134 S. Ct. 1115 (2014). The Court conceded that the injury

caused by the defendant's allegedly tortious conduct occurred in Nevada by virtue of the plaintiff's Nevada residency and that the defendant was well aware of the plaintiff's residency. *Id.* at 1125. But the Court concluded that that evidence was insufficient to establish that the plaintiff's claims "arose out of or were related to" relevant forum contacts. It explained that "[f]or a State to exercise jurisdiction consistent with due process," it is the defendant's "suit-related conduct" that must create a "substantial connection" with the forum State, *id.* at 1121, and the happenstance of the plaintiff's residency was unrelated to the defendant's allegedly tortious conduct in Atlanta. In other words, it made no difference whether the DEA agent might have had numerous other connections with Nevada that were not "suit related." In the absence of evidence that *the defendant's conduct toward the plaintiff and his claim* had some connection with Nevada, the Due Process Clause prohibited a Nevada court from exercising personal jurisdiction. The decision below, which based a finding of specific jurisdiction on BMS forum contacts that were not "suit related," cannot be reconciled with *Walden*.

As Justice Werdegar explained in dissent:

> Of the post-*International Shoe* decisions in which the high court actually found a factual basis for specific jurisdiction, each featured a direct link between forum activities and the litigation. (See *Burger King Corp. v. Rudzewicz*, (1985) 471 U.S. 462, 479-80 [specific jurisdiction in Florida courts proper where franchise dispute "grew directly out of" contract formed between

> Florida franchisor and Michigan franchisee, whose breach caused "caused foreseeable injuries to the corporation in Florida."])

Pet. App. 53a-54a.

In rejecting BMS's argument that California courts lack personal jurisdiction to adjudicate claims against BMS brought by "nonresident plaintiffs [who] have no connection to and did not suffer any Plavix-related injuries in the state," the California Supreme Court relied on this Court's decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). Pet. App. 33a-34a. It asserted, "As the high court explicitly declared in *Keeton*, a 'plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of the defendant's contacts.'" *Id.* at 34a (quoting *Keeton*, 465 U.S. at 780). The court badly misconstrued *Keeton*. Although the plaintiff in that case did not reside in the forum State (New Hampshire), she suffered injuries there. The defendant's allegedly libelous publication was widely circulated in New Hampshire, causing injury to the plaintiff's reputation within the State. Indeed, *Keeton*'s heavy reliance on the defendant's litigation-related contacts with New Hampshire in upholding the exercise of personal jurisdiction by the New Hampshire court directly undercuts the California Supreme Court's position. *Keeton* quite clearly does not support the claim that exercise of specific jurisdiction is proper even though Respondents "did not suffer any Plavix-related injuries in the State." *Id.* at 33a-34a.

Particularly troubling is the California Supreme Court's reliance on the fact that "BMS maintains research and laboratory facilities in California, and it presumably enjoys the protection of our laws related to those activities." Pet. App. 29a. Even though the court conceded that none of those facilities has ever conducted any research regarding Plavix, it concluded that the existence of those facilities "provides an additional connection between the nonresident plaintiffs' claims and the company's activities in California." *Ibid.* The Court justified that "substantial nexus and connection" finding on the fact that the complaint includes claims that *other* BMS research facilities located in *other* States were responsible for the allegedly negligent development and design of Plavix. That justification—which is based on nothing more than a similarity of function between the California-based facilities and the non-California BMS facilities responsible for BMS's allegedly tortious conduct—well illustrates the essentially limitless nature of California's assertion of personal jurisdiction over nonresident companies that conduct business within the State. Review is warranted to resolve the conflict between the decision below and this Court's specific jurisdiction case law.

### B. The California Supreme Court's Expansive Definition of Specific Jurisdiction Ignores *Daimler*'s Admonition to Keep Rules Governing Jurisdiction Simple in Order to Promote Greater Predictability

The Court explained in *Daimler* that it adopted its rule governing general jurisdiction over corporations in part because of its simplicity. Ascertaining a corporation's principal place of business and its place of incorporation—the attributes that *Daimler* held are determinative in assessing where a corporation is "at home"—is a relatively straightforward exercise:

> Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. Cf. *Hertz Corp. v. Fried*, 559 U.S. 77, 94 (2010) ("Simple jurisdictional rules . . . promote greater predictability."). These bases afford plaintiffs at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

*Daimler*, 134 S. Ct. at 760.

By upholding personal jurisdiction under its expansive definition of specific jurisdiction, the California Supreme Court has adopted a jurisdictional rule that is anything but simple. Among other things, the court's "substantial nexus or connection test" establishes a sliding scale, under which a showing that

the defendant has numerous forum contacts (regardless whether they are litigation-related) reduces the required showing of connection between those contacts and the plaintiffs' claim. Pet. App. 22a. But the unspecified degree of reduction is left to be resolved by California courts on a case-by-case basis. *Id.* at 35.

As a result, out-of-state corporations are left with little guidance regarding what activity in California will render them subject to the jurisdiction of California courts for claims arising outside the State. That result is inconsistent with *Daimler*'s goal of predictability and warrants review by this Court.

The court below did not dispute the highly attenuated nature of the relationship between California and the Respondents' claims. It nonetheless concluded that California courts could exercise specific jurisdiction over Respondents' claims based on a smorgasbord of BMS forum contacts. At no point did it specify which of those contacts, by themselves, would be sufficient to establish personal jurisdiction. Indeed, although the court noted that some Plavix-based products-liability claims have been filed by California residents against BMS based on theories similar to those raised by Respondents, the court never specified whether the existence of such claims was crucial to its personal-jurisdiction finding.

A rule so amorphous provides corporations with no guidance whatsoever. The California Supreme Court insists that the Respondents' claims "arise out of or are connected with" BMS's contacts, but nonresident defendants are left to wonder precisely what that

connection consists of. One plausible interpretation: manufacturers that market their products on a nationwide basis are subject to suit in each of the 50 States with respect to *any* claim arising out of the sale of their products. BMS is hardly unique among manufacturers in distributing its products pursuant to a nationwide distribution and marketing plan. But if that is the California Supreme Court's rule, little is left of *Daimler*; the court will simply have substituted a new name (specific jurisdiction) for the exorbitant understanding of general jurisdiction rejected by *Daimler* as too grasping.

As *Daimler* explained in rejecting the Ninth Circuit's expansive understanding of personal jurisdiction over nonresident defendants based on claims arising outside the forum, "Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King Corp. v. Rudzewicz* 471 U.S. 462, 472 (1985)).

The court below dismissed those concerns, asserting that BMS "embraced th[e] risk" of being sued in California by nonresident plaintiffs when it decided to include California within its nationwide Plavix sales efforts. Pet. App. 33a. But it is unrealistic to expect large manufacturers to exclude California from their marketing efforts. More importantly, the court's rationale is inconsistent with *Daimler*'s condemnation of "exorbitant exercises of all-purpose jurisdiction" by California courts based merely on evidence that the

defendant engaged in continuous and systematic business activity within the State. Review is warranted to provide companies with clearer guidance regarding what greater extent of forum contacts, beyond simply conducting business on a continuous and systematic basis, is sufficient to expose them to the specific jurisdiction of forum courts.

## II. THE PETITION IS AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT AMONG THE LOWER COURTS

Review is also warranted because the petition provides an exceptionally good vehicle for resolving the personal-jurisdiction issue over which the lower courts are so sharply conflicted. Indeed, the California Supreme Court expressly recognized that the case turns solely on issues of law. It stated:

> [T]here appears to be no material factual conflicts nor any dispute over any factual findings in the superior court. We, therefore, consider the possible exercise of each type of jurisdiction as a matter of law and on the undisputed facts.

Pet. App. 8a-9a. Accordingly, there is no danger that a disputed factual record could muddle efforts by the Court to announce a clear rule governing due-process limits on a state court's exercise of specific jurisdiction.

It is undisputed that BMS properly raised its due-process objection to personal jurisdiction at all stages of the litigation. The superior court, the appeals

court, and the California Supreme Court each addressed the merits of that objection.

Moreover, the split between the California Supreme Court and other appellate courts that have adopted a more restrictive view of specific jurisdiction is outcome-determinative. The courts below did not assert that any of BMS's California activity was the proximate cause, or even a but-for cause, of Respondents' injuries. Indeed, the California Supreme Court expressly held that "the defendant's activities in the forum state need not be either the proximate cause or the 'but for' cause of the plaintiff's injuries" to warrant an exercise of specific jurisdiction. Pet. App. 22a. Accordingly, there can be no dispute that were this case to come before one of the many federal appeals courts and state supreme courts that impose either a proximate cause or a "but for" cause requirement, Respondents' claims would have been dismissed for lack of personal jurisdiction.

Indeed, the California Supreme Court implicitly recognized the conflict between its decision and the appellate decisions relied on by BMS. BMS's California brief cited *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984), as an example of a case in which an appellate court determined that products-liability claims filed by nonresident plaintiffs against a nonresident drug company should not be deemed to "arise out of or relate to" the defendant's forum activities because the plaintiffs had not established a causal relationship between the forum activities and the plaintiffs' injuries. The court did not challenge BMS's characterization of the First Circuit's holding.

Instead, its principal response was that *Glater* was issued before *Vons Companies v. Seabest Foods, Inc.*, 14 Cal. 4th 434 (1996), the decision in which the California Supreme Court first announced its "substantial nexus or connection" test, and thus that the First Circuit did not "ha[ve] the benefit of our reasoning in *Vons*" when it ruled. Pet. App. 32a. By expressing a hope that the First Circuit would have ruled differently had it had access to *Vons*, the California court tacitly conceded that its "substantial nexus or connection" standard directly conflicts with the First Circuit's proximate-cause standard.

Review is particularly warranted in light of the important role played by California in the national economy. The State's population now exceeds 39 million, and a significant portion of all consumer goods sold in the United States are sold there. As Justice Werdegar noted, any company that sells its products on a nationwide basis will face considerable competitive pressure to market its products in California. Pet. App. 84a. Yet, the California Supreme Court has now warned all such companies in essence that if they market their goods in California, they can be haled into California courts to answer claims arising from product sales in any of the 50 States. Because California's immense size means that the decision below is likely to have a significant impact on commerce nationwide, the Court should grant review to determine whether this new litigation burden is constitutionally permissible.

Review is also warranted because the decision below threatens to place California courts in the role of adjudicating disputes that arose in other States and

thereby threatens to interfere with the interests of those other States in adjudicating disputes arising within their borders. As the Court explained in *World-Wide Volkswagen*, the "minimum contacts" limitation on personal jurisdiction also "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. ... [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen*, 444 U.S. at 292-93. By granting review, the Court can ensure that California does not encroach on the sovereign rights of other States.

Finally, further delay is unwarranted in resolving conflicting lower-court decisions regarding when a plaintiff's claims "arise out of or relate to" the defendant's forum activities. *Daimler* imposed strict due-process limits on state-court exercise of general jurisdiction, thereby causing plaintiffs' attorneys to shift gears and cite specific jurisdiction as the basis of their overbroad jurisdictional claims. Indeed, *Daimler* has been cited more than 1,000 times in federal and state-appellate court decisions issued in the past two years—usually in connection with specific-jurisdiction claims. Given the large number of cases coming before the lower courts on a regular basis which call for a decision on specific-jurisdiction issues, early resolution of the conflict identified by the petition would provide valuable guidance to those courts.

## CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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November 10, 2016

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Supreme Court, U.
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No. 16-466

IN THE
# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
*Respondents*.

On Writ of Certiorari to the
California Supreme Court

## JOINT APPENDIX

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**PETITION FOR A WRIT OF CERTIORARI FILED: OCTOBER 7, 2016**
**CERTIORARI GRANTED: JANUARY 19, 2017**

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

PLAVIX PRODUCT AND MARKETING CASES

Case Number CJC 13 004748

**DOCKET ENTRIES**

| Date | Proceedings |
|---|---|
| FEB-11-2013 | ORDER ASSIGNING COORDINATION JUDGE FILED BY OTHER CHAIR, JUDICIAL COUNCIL OF CALIFORNIA COMPLEX LITIGATION ASSIGNMENT REQUESTED BY FILING PARTIES; FEE INCLUDED IN FILING FEE |
| | * * * |
| MAY-1-2013 | ORDER ASSIGNING COORDINATION TRIAL JUDGE AND SETTING HEARING |
| | * * * |
| JUL-09-2013 | MOTION TO QUASH SERVICE OF SUMMONS OR STAY OR DISMISS / NTC OF MO & MO TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53181513) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPANY HEARING SET FOR SEP-23-2013 AT 09:30 |

| Date | Proceedings |
|---|---|
| | AM IN DEPT 305 |
| JUL-09-2013 | MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MO TO QUASH SERVICE OF SUMMONS OF COMPLT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53181513) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPANY |
| JUL-09-2013 | DECLARATION OF JEREMY M. MCLAUGHLIN IN SUPPORT OF MO TO QUASH SERVICE OF SUMMONS OF COMPLAINT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53181513) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPANY |
| JUL-09-2013 | EXHIBIT A TO DECL OF JEREMY M. MCLAUGHLIN IN SUPPORT OF MO TO QUASH SERVICE OF SUMMONS OF COMPLAINT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53181513) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPANY |

| Date | Proceedings |
|---|---|
| JUL-09-2013 | EXHIBIT B TO DECL OF JEREMY M. MCLAUGHLIN IN SUPPORT OF MO TO QUASH SERVICE OF SUMMONS OF COMPLAINT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53181513) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPANY |
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| JUL-09-2013 | EXHIBIT D TO DECL OF JEREMY M. MCLAUGHLIN IN SUPPORT OF MO TO QUASH SERVICE OF SUMMONS OF COMPLAINT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53181513) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPANY |
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| Date | Proceedings |
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| | MYERS SQUIBB COMPANY |
| | * * * |
| AUG-02-2013 | OPPOSITION TO DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53371937) FILED BY PLAINTIFF COUNTY OF SANTA CLARA |
| AUG-02-2013 | DECLARATION OF JOSHUA C. EZRIN IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53371937) FILED BY PLAINTIFF COUNTY OF SANTA CLARA |
| | * * * |
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| Date | Proceedings |
|---|---|
| | COMPLT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53775551) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPA-NY |
| | * * * |
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| Date | Proceedings |
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| | BRISTOL-MYERS SQUIBB COMPA-NY |
| AUG-16-2013 | EXHIBIT D TO DECL OF JEREMY M. MCLAUGHLIN IN SUPPORT OF REPLY IN SUPPORT OF MO TO QUASH SERVICE OF SUMMONS OF COMPLT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53775551) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPA-NY |
| AUG-16-2013 | EXHIBIT E TO DECL OF JEREMY M. MCLAUGHLIN IN SUPPORT OF REPLY IN SUPPORT OF MO TO QUASH SERVICE OF SUMMONS OF COMPLT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53775551) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPA-NY |
| AUG-16-2013 | EXHIBIT F TO DECL OF JEREMY M. MCLAUGHLIN IN SUPPORT OF REPLY IN SUPPORT OF MO TO QUASH SERVICE OF SUMMONS OF COMPLT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53775551) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPA-NY |
| AUG-16-2013 | EXHIBIT G TO DECL OF JEREMY M. MCLAUGHLIN IN SUPPORT OF |

| Date | Proceedings |
|---|---|
| | REPLY IN SUPPORT OF MO TO QUASH SERVICE OF SUMMONS OF COMPLT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53775551) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPANY |
| AUG-16-2013 | EXHIBIT H TO DECL OF JEREMY M. MCLAUGHLIN IN SUPPORT OF REPLY IN SUPPORT OF MO TO QUASH SERVICE OF SUMMONS OF COMPLT FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID # 53775551) FILED BY DEFENDANT BRISTOL-MYERS SQUIBB COMPANY |
| | * * * |
| SEP-23-2013 | ORDER DENYING DEFENDANT BRISTOL-MYERS SQUIBB COMPANY'S MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION (TRANSACTION ID #54271302) |
| | * * * * |

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION TWO

BRISTOL-MYERS SQUIBB COMPANY

v.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO

Case Number A140035

## DOCKET ENTRIES

| Date | Description | Notes |
|---|---|---|
| | * * * | |
| 10/22/2013 | Filed petition for writ of: | Mandate |
| 10/22/2013 | Exhibits lodged. | 3 Volumes [PDFs available on disc] |
| | * * * | |
| 10/28/2013 | Opposition requested. | 15 days |
| | * * * | |
| 11/01/2013 | Opposition filed. | |
| 11/08/2013 | Reply filed to: | |

| Date | Description | Notes |
|---|---|---|
| 11/12/2013 | Opposition filed. | |
| 11/26/2013 | Reply filed to: | Petitioner's Reply to Opposition |
| 01/14/2014 | Order denying petition filed. | The petition for writ of mandate is denied. |
| 01/14/2014 | Case complete. | |
| 01/27/2014 | Service copy of petition for review received. | Petitioner |
| 02/03/2014 | Record transmitted to Supreme Court. | |
| | * * * | |
| 02/26/2014 | Supreme Court order filed re: | The petition for review is granted. The matter is transferred to the Court of Appeal, First Appellate District, Division Two, with directions to vacate its order denying mandate and to issue an order to show cause why relief sought in the petition |

| Date | Description | Notes |
|---|---|---|
| | | should not be granted. |
| | * * * | |
| 03/13/2014 | Issued order to show cause. | Upon direction of the Supreme Court, this court's order of January 14, 2014, denying the petition for writ of mandate is hereby vacated. IT IS ORDERED that Respondent show cause before this court when the matter is ordered on calendar why the relief requested in the petition should not be granted. The return shall be served and filed on or before March 28, 2014, and the traverse thereto shall be filed within 15 days after service of the return. This order to show cause is to be served and filed on or before March 14, 2014. It shall be deemed served upon mailing by the clerk of this court of certified copies of this order to all parties to this proceeding. |

| Date | Description | Notes |
|---|---|---|
| 03/28/2014 | Written return filed. | Opposition of Real Parties' in Interest, Bracy Anderson et al., to Bristol-Myers Squibb Company's Petition for Review |
| | * * * | |
| 04/14/2014 | Traverse to return filed. | |
| | * * * | |
| 06/10/2014 | Letter sent to counsel re: | Memorandum to Counsel Re: A140035, Bristol-Myers Squibb Company v. Superior Court; Bracy Anderson et al. Dear Counsel: Please be prepared to address at oral argument the following issues, in addition to those raised in the parties' briefs: 1. Footnote 1 of the petition states that "40 actions involving 2, 363 plaintiffs have been filed in San Francisco Superior Court." The petition further states that petitioner removed these 40 actions to federal court and that 37 |

| Date | Description | Notes |
|---|---|---|
| | | of 40 were transferred to a federal multidistrict litigation proceeding in the District of New Jersey, where plaintiffs have moved to remand them back to state court. What is the status of plaintiffs' efforts to remand these actions? Does the status of these actions make any difference to our analysis of specific jurisdiction? 2. Please be prepared to discuss Walden v. Fiore, ___ U.S. ___, 134 S.Ct. 1115 (2014) and Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal.4th 1054, as well as any cases cited in those decisions not already discussed in the parties' briefs. 3. Petitioner argues that Real Parties in Interest did not file a proper return pursuant to California Rules of Court, rule 8.487(b)(1). Please be prepared to discuss |

| Date | Description | Notes |
|---|---|---|
| | | what facts, if any, have been admitted and the significance of any such facts to the court's analysis of specific jurisdiction. Very truly yours, Diana Herbert, Clerk/Administrator By: Stacy Wheeler Deputy Clerk |
| | | * * * |
| 06/17/2014 | Note: | Cause argued and submitted. |
| | | * * * |
| 07/30/2014 | Opinion filed. | (Signed Published) For the foregoing reasons, the trial court properly denied BMS's motion to quash service of the summons regarding the RPI complaints. The order to show cause is DISCHARGED. The petition is denied. |
| | | * * * * |

CALIFORNIA SUPREME COURT

BRISTOL-MYERS SQUIBB COMPANY

v.

S.C. (ANDERSON)

Case Number S221038

## DOCKET ENTRIES

| Date | Description | Notes |
|---|---|---|
| 09/05/2014 | Petition for review filed | Petitioner: Bristol-Myers Squibb Company<br>Attorney: Jerome B. Falk |
| | * * * | |
| 09/25/2014 | Received: | answer to petition for review without original and filing fee. - sending hard copy original in the mail with filing fee. |
| 09/25/2014 | Answer to petition for review filed | Real Party in Interest: Bracy Anderson et al.<br>Attorney: John Lytle |
| 10/03/2014 | Reply to answer to petition filed | Petitioner: Bristol-Myers Squibb Company<br>Attorney: Sean Michael SeLegue |

| Date | Description | Notes |
|---|---|---|
| | * * * | |
| 11/19/2014 | Petition for review granted | Applications to appear as counsel pro hac vice granted. The applications of Anand Agneshwar, Roberta "Lea" Brilmayer, Daniel Pariser, Steven G. Reade and Anna Thompson for admission pro hac vice to appear on behalf of Bristol-Myers Squibb Company are granted. The petition for review is granted and the parties are directed to address: (1) whether after Daimler AG v. Bauman (2014) 571 U.S. ___ [187 L.Ed.2d 624; 134 S.Ct. 746], general jurisdiction exists; and (2) whether specific jurisdiction exists. Votes: Cantil-Sakauye, C.J., Baxter, Werdegar, Chin, Corrigan and Liu, JJ. |
| | * * * | |
| 02/02/2015 | Opening brief on the | Petitioner: Bristol-Myers Squibb Compa- |

| Date | Description | Notes |
|---|---|---|
| | merits filed | ny<br>Attorney: Jerome B. Falk<br><br>Opening brief on the merits filed. Due on 02/02/2015 By 60 Day(s) |
| | * * * | |
| 04/20/2015 | Answer brief on the merits filed | Real Party in Interest: Bracy Anderson et al.<br>Attorney: Kelly Ann McMeekin<br><br>Answer brief on the merits filed. Due on 04/20/2015 By 47 Day(s) |
| | * * * | |
| 05/11/2015 | Reply brief filed (case fully briefed) | Petitioner: Bristol-Myers Squibb Company<br>Attorney: Jerome B. Falk<br><br>Reply brief filed (case fully briefed). Due on 05/26/2015 By 15 Day(s) |
| | * * * | |

| Date | Description | Notes |
|---|---|---|
| 08/13/2015 | Response to amicus curiae brief filed | Petitioner: Bristol-Myers Squibb Company<br>Attorney: Jerome B. Falk<br><br>Amicus curiae: California Chamber of Commerce<br>Attorney: Donald M. Falk<br><br>Amicus curiae: Pharmaceutical Reserch and Manufacturers of America<br>Attorney: Donald M. Falk<br><br>petitioner's answer to the amicus curiae brief of Consumer Attorneys of California. |
| | * * * | |
| 05/18/2016 | Filed: | Letter dated May 18, 2016, regarding additional authorities. Bristol-Myers Squibb Company, Petitioner Jerome B. Falk, Retained counsel |

| Date | Description | Notes |
|---|---|---|
| | * * * | |
| 06/02/2016 | Cause argued and submitted | |
| | * * * | |
| 08/29/2016 | Opinion filed: Judgment affirmed in full | The judgment of the Court of Appeal is affirmed. Majority Opinion by Cantil-Sakauye, C. J. – joined by Liu, Cuellar, and Kruger, JJ. Dissenting Opinion by Werdegar, J. – joined by Chin and Corrigan, JJ. |
| | * * * | |
| 09/14/2016 | Motion filed | motion to stay issuance of remittitur. by Jerome B. Falk, Jr., counsel for petitioner Bristol-Myers Squibb Company. |
| 09/21/2016 | Stay order filed | Issuance of the remittitur in the above-entitled cause is stayed to permit defendants to file a petition for writ of certiorari with the Supreme Court of the United States, which is |

| Date | Description | Notes |
|---|---|---|
| | | currently due in that court on or before November 27, 2016. (28 U.S.C. § 2101(c); U.S. Supreme Ct. R. 13(1), 30(1).) Upon the filing of that petition, the issuance of the remittitur is further stayed until final determination of the certiorari proceeding. If a petition for writ of certiorari is not filed within the time prescribed, the stay will terminate when the time for filing the petition has expired. |

* * * *

SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN FRANCISCO

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Case No. CGC-12-519085

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VIRGIL S. ANDERSON, WILLIE E. ANDERSON, BEULAH BAHAM, BRIAN P. BARTON, LAURA BEAVERS, JAMES BEAVERS, LOYD K. BOONE, JOYCE BOONE, LESTER G. BOUTWELL, ROBERT C. BRATTON AND GRACE C. BRATTON, IKIE R. BREWSTER, MAXINE E. BROWN AND EUGENE L. BROWN, NELLIE CHENOWETH, WILLIAM F. COOK, SHIRLEY COOK, CEDRIC A. CREEKS, ELLARHEE D. DOWLER, DANNY D. DOWLER, ALLEN P. DULANEY, DOROTHY H. DULANEY, CAROLYN V. DUNN, JACKY W. DUNSMORE, KAREN K. DUNSMORE, PAUL G. EHMER, ROBERTA F. EHMER, FRIEDA L. EVANS, HAROLD E. EVANS, DOROTHY A. EMERSON-EVANS, DONALD FLETCHER, RITA FLETCHER, ROBERT L. GILMORE, FIORA J. GILMORE, JOSE GONZALES, SENAIDA GONZALES, BOBBY R. GREEN, CINDY GREEN, LLOYD G. GREGG, MELVIN L. GRIFFIN, JOSE F. GUTIERREZ, MARIA E. GUTIERREZ, DONALD G. JONES, STANLEY B. KOWALESKI, IRENE M. KOWALESKI, LARRY M. LAMP, BRENDA LAMP, JOHN C. LISOTTA, BARBARA LISOTTA, WILLIAM J. MAHER, JOHN L. MCKENZIE, JULIANNE NICKS, ROLAND ROMERO, DANIEL M. RUECKER, ROLIN T. RUTHERFORD, BONNIE RUTHERFORD, MARY L. SHEPHARD, KEVIN M. SHEPHARD, DONALD L. SOUZA, DONG TUNISON, GARY J. VAN DYKE, DOROTHY

VANCE, EDWARD VANCE, REX A. VICTORY, MARILYN VICTORY, ANTHONY G. WILLIAMS, DONALD E. WITT, PHYLLIS WITT, JAMES WOODMANSEE, SHARON M. WOODMANSEE, EVELYN L. ZAWICKI AND MICHAEL G. ZAWICKI,

*Plaintiffs,*

vs.

BRISTOL-MYERS SQUIBB COMPANY; MCKESSON CORPORATION, and DOES 1 to 100,

*Defendants.*

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FILED March 12, 2012

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**COMPLAINT FOR DAMAGES**
**JURY TRIAL DEMAND**

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1. Strict Products Liability
2. Strict Liability - Manufacturing Defect
3. Negligence
4. Breach of Implied Warranty
5. Breach of Express Warranty
6. Deceit by Concealment – Ca. Civ. Code §§ 1709, 1710
7. Negligent Misrepresentation
8. Fraud by Concealment
9. Violation of Cal. Bus. & Prof. Code § 17200
10. Violation of Cal. Bug. & Prof. Code § 17500
11. Violation of Cal. Civ. Code § 1750
12. Loss of Consortium

COME NOW Plaintiffs, and each of them, and complain and allege against Defendants, Does 1 through 100, and each of them as follows:

GENERAL ALLEGATIONS

1. This action involve claims of personal injury, economic damages, punitive damages, and other claims of damage arising from the use of Plavix, a pharmaceutical compound researched, designed, formulated, compounded, tested, manufactured, produced, processed, assembled, inspected, distributed, marketed, labeled, promoted, packaged, advertised for sale, prescribed or otherwise placed in the stream of interstate commerce by Defendant BRISTOL-MEYERS SQUIBB COMPANY ("BMS") and marketed, sold, and distributed by Defendant MCKESSON CORPORATION ("McKesson") and is brought on behalf of the named plaintiffs, collectively referred to herein as "Plaintiffs". This action seeks, among other relief, general and special damages and equitable relief in order to enable the living Plaintiffs who ingested Plavix to treat and monitor the dangerous, severe and life threatening side effects caused by this drug, including but not limited to gastrointestinal bleeding, bleeding ulcers, TTP, and other injuries.

2. The true names or capacities whether individual, corporate or otherwise, of Defendants Does 1 through 100, inclusive, are unknown to Plaintiffs who therefore, pursuant to California Code of Civil Procedure §474, sue said Defendants by such fictitious names. Plaintiffs believe and allege that each of the Defendants designated herein by fictitious names is in some manner legally responsible for the events and happenings herein referred to and caused

damages proximately and foreseeably to Plaintiffs as alleged herein.

3. At all times herein mentioned, each of the Defendants was the agent, servant, partner, aider and abettor, co-conspirator and joint venturer of each of the remaining Defendants herein and were at all times operating and acting within the purpose and scope of said agency, service, employment, partnership, conspiracy and joint venture and rendered substantial assistance and encouragement to the other Defendants, knowing that their conduct constituted a breach of duty.

4. There exists, and at all times herein mentioned, there existed, a unity of interest in ownership between certain Defendants and other certain Defendants such that any individuality and separateness between the certain Defendants has ceased and these Defendants are the alter ego of the other certain Defendant, and exerted control over those Defendants. Adherence to the fiction of the separate existence of these certain Defendants as any entity distinct from other certain Defendants will permit an abuse of the corporate privilege and would sanction fraud and would promote injustice.

5. The injuries and damages to Plaintiffs were caused by the wrongful acts, omissions, and fraudulent representations of Defendants, many of which occurred within the State of California.

6. At all times herein mentioned, Defendants were each engaged in the business of, or were successors in interest to, entities engaged in the business of research, designing, formulating, compounding, testing, manufacturing, producing, processing, assembling, inspecting, distributing, marketing, la-

beling, promoting, packaging and/or advertising for sale or selling the drug Plavix.

7. At all times herein mentioned, Defendants were each authorized to do business within the State of California and did in fact supply the aforementioned products within the State of California.

8. At all times herein mentioned, the officers and directors of Defendants authorized and directed the production and promotion of the aforementioned products when they knew, or with the exercise of reasonable care should have known, of the hazards and dangerous propensities of said products, and thereby actively participated in the tortious conduct which resulted in the physical injuries described herein.

JURISDICTION AND VENUE

9. Plaintiffs are informed and believe, and thereon allege that at all times herein mentioned each of the Defendants hereto are individuals, corporations, partnerships and/or unincorporated associations organized and existing under and by virtue of the laws of the State of California, or the laws of some other state or foreign jurisdiction, and that said Defendants, and each of them, were and are authorized to do and are doing business in the State of California, or the laws of some other state or foreign jurisdiction, and that said Defendants, and each of them, were and are authorized to do and are doing business in the State of California, and that said Defendants have regularly conducted business in the County of San Francisco, State of California.

10. Venue is proper in this county because at least one Defendant, McKesson Corporation, has its principal place of business in this county.

PLAINTIFFS

11. Plaintiff VIRGIL S. ANDERSON is a natural person currently residing in Texas. Plaintiff Anderson was prescribed and ingested Plavix and/or Plavix plus aspirin on or around November of 1999 and thereafter. On or Around April of 2009, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

12. Plaintiff WILLIE E. ANDERSON is a natural person and spouse of Plaintiff VIRGIL S. ANDERSON.

13. Plaintiff BEULAH BAHAM is a natural person currently residing in Texas. Plaintiff Baham was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2009 and thereafter. On or Around January of 2009, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Rectal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

14. Plaintiff BRIAN P. BARTON is a natural person currently residing in Alaska. Plaintiff Barton was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2007 and thereafter. On or Around December of 2009, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to

Cerebral Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

15. Plaintiff LAURA BEAVERS is a natural person currently residing in Alabama. Plaintiff Beavers was prescribed and ingested Plavix and/or Plavix plus aspirin on or around December of 1999 and thereafter. On or Around January of 2006, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

16. Plaintiff JAMES BEAVERS is a natural person and spouse of Plaintiff LAURA BEAVERS.

17. Plaintiff LOYD K. BOONE is a natural person currently residing in Texas. Plaintiff Boone was prescribed and ingested Plavix and/or Plavix plus aspirin on or around December of 2005 and thereafter. On or Around May of 2008, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Cerebral Bleeding; Stroke. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

18. Plaintiff JOYCE BOONE is a natural person and spouse of Plaintiff LOYD K. BOONE.

19. Plaintiff LESTER G. BOUTWELL is a natural person currently residing in Texas. Plaintiff Boutwell was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 1998 and thereafter. On or Around January of 2004, Plaintiff

suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

20. Plaintiff ROBERT C. BRATTON is a natural person currently residing in Alabama. Plaintiff Bratton was prescribed and ingested Plavix and/or Plavix plus aspirin on or around April of 2004 and thereafter. On or Around March of 2008, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

21. Plaintiff GRACE C. BRATTON is a natural person and spouse of Plaintiff ROBERT C. BRATTON.

22. Plaintiff IKIE R. BREWSTER is a natural person currently residing in Texas. Plaintiff Brewster was prescribed and ingested Plavix and/or Plavix plus aspirin on or around September of 2002 and thereafter. On or Around August of 2005, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

23. Plaintiff MAXINE E. BROWN is a natural person currently residing in Texas. Plaintiff Brown was prescribed and ingested Plavix and/or Plavix

plus aspirin on or around January of 2006 and thereafter. On or Around January of 2006, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

24. Plaintiff EUGENE L. BROWN is a natural person and spouse of Plaintiff MAXINE E. BROWN.

25. Plaintiff NELLIE CHENOWETH is a natural person currently residing in Kansas. Plaintiff Chenoweth was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2007 and thereafter. On or Around April of 2007, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

26. Plaintiff WILLIAM F. COOK is a natural person currently residing in Texas. Plaintiff Cook was prescribed and ingested Plavix and/or Plavix plus aspirin on or around November of 2002 and thereafter. On or Around October of 2004, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

27. Plaintiff SHIRLEY COOK is a natural person and spouse of Plaintiff WILLIAM F. COOK.

28. Plaintiff CEDRIC A. CREEKS is a natural person currently residing in Texas. Plaintiff Creeks was prescribed and ingested Plavix and/or Plavix plus aspirin on or around July of 2004 and thereafter. On or Around October of 2006, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding, Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

29. Plaintiff ELLARHEE D. DOWLER is a natural person currently residing in West Virginia. Plaintiff Dowler was prescribed and ingested Plavix and/or Plavix plus aspirin on or around February of 2008 and thereafter. On or Around July of 2008, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Cerebral Bleeding; Stroke. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

30. Plaintiff DANNY D. DOWLER is a natural person and spouse of Plaintiff ELLARHEE D. DOWLER.

31. Plaintiff ALLEN P. DULANEY is a natural person currently residing in Oregon. Plaintiff Dulaney was prescribed and ingested Plavix and/or Plavix plus aspirin on or around June of 2002 and thereafter. On or Around July of 2003, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the

Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

32. Plaintiff DOROTHY H. DULANEY is a natural person and spouse of Plaintiff ALLEN P. DULANEY.

33. Plaintiff CAROLYN V. DUNN is a natural person currently residing in Texas. Plaintiff Dunn was prescribed and ingested Plavix and/or Plavix plus aspirin on or around October of 2006 and thereafter. On or Around April of 2010, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

34. Plaintiff JACKY W. DUNSMORE is a natural person currently residing in Texas. Plaintiff Dunsmore was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2002 and thereafter. On or Around May of 2010, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Cerebral Bleeding; Heart Attack; Stroke. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

35. Plaintiff KAREN K. DUNSMORE is a natural person and spouse of Plaintiff JACKY W. DUNSMORE.

36. Plaintiff PAUL G. EHMER is a natural person currently residing in Texas. Plaintiff Ehmer was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2001 and thereafter.

On or Around January of 2002, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

37. Plaintiff ROBERTA F. EHMER is a natural person and spouse of Plaintiff PAUL G. EHMER.

38. Plaintiff FRIEDA L. EVANS is a natural person currently residing in Texas. Plaintiff Evans was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2002 and thereafter. On or Around January of 2008, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Gastrointestinal Bleeding; Thrombotic Thrbocytopenic Purpura (TTP). Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

39. Plaintiff HAROLD E. EVANS is a natural person currently residing in Texas. Plaintiff Evans was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2001 and thereafter. On or Around January of 2011, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

40. Plaintiff DOROTHY A. EMERSON-EVANS is a natural person and spouse of Plaintiff HAROLD E. EVANS.

41. Plaintiff DONALD FLETCHER is a natural person currently residing in Kentucky. Plaintiff Fletcher was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2003 and thereafter. On or Around April of 2011, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

42. Plaintiff RITA FLETCHER is a natural person and spouse of Plaintiff DONALD FLETCHER.

43. Plaintiff ROBERT L. GILMORE is a natural person currently residing in Texas. Plaintiff Gilmore was prescribed and ingested Plavix and/or Plavix plus aspirin on or around March of 1999 and thereafter. On or Around January of 2002, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

44. Plaintiff FIORA J. GILMORE is a natural person and spouse of Plaintiff ROBERT L. GILMORE.

45. Plaintiff JOSE GONZALES is a natural person currently residing in Texas. Plaintiff Gonzales was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2009 and

thereafter. On or Around January of 2010, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

46. Plaintiff SENAIDA GONZALES is a natural person and spouse of Plaintiff JOSE GONZALES.

47. Plaintiff BOBBY R. GREEN is a natural person currently residing in Texas. Plaintiff Green was prescribed and ingested Plavix and/or Plavix plus aspirin on or around March of 2008 and thereafter. On or Around December of 2009, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

48. Plaintiff CINDY GREEN is a natural person and spouse of Plaintiff BOBBY R. GREEN.

49. Plaintiff LLOYD G. GREGG is a natural person currently residing in Texas. Plaintiff Gregg was prescribed and ingested Plavix and/or Plavix plus aspirin on or around November of 1997 and thereafter. On or Around January of 2007, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

50. Plaintiff MELVIN L. GRIFFIN is a natural person currently residing in Texas. Plaintiff Griffin was prescribed and ingested Plavix and/or Plavix plus aspirin on or around June of 2003 and thereafter. On or Around January of 2009, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

51. Plaintiff JOSE F. GUTIERREZ is a natural person currently residing in Texas. Plaintiff Gutierrez was prescribed and ingested Plavix and/or Plavix plus aspirin on or around November of 1998 and thereafter. On or Around November of 2007, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

52. Plaintiff MARIA E. GUTIERREZ is a natural person and spouse of Plaintiff JOSE F. GUTIERREZ.

53. Plaintiff DONALD G. JONES is a natural person currently residing in Oregon. Plaintiff Jones was prescribed and ingested Plavix and/or Plavix plus aspirin on or around October of 2006 and thereafter. On or Around September of 2007, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Gastrointestinal Bleeding. Plaintiff was una-

ware the Plaintiffs injuries were caused by Plavix until within two years of filing this complaint.

54. Plaintiff STANLEY B. KOWALESKI is a natural person currently residing in New Jersey. Plaintiff Kowaleski was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2007 and thereafter. On or Around January of 2009, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

55. Plaintiff IRENE M. KOWALESKI is a natural person and spouse of Plaintiff STANLEY B. KOWALESKI.

56. Plaintiff LARRY M. LAMP is a natural person currently residing in West Virginia. Plaintiff Lamp was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2004 and thereafter. On or Around December of 2009, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Cerebral Bleeding; Heart Attack; Stroke. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

57. Plaintiff BRENDA LAMP is a natural person and spouse of Plaintiff LARRY M. LAMP.

58. Plaintiff JOHN C. LISOTTA is a natural person currently residing in Louisiana. Plaintiff Lisotta was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2008 and

thereafter. On or Around April of 2011, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

59. Plaintiff BARBARA LISOTTA is a natural person and spouse of Plaintiff JOHN C. LISOTTA.

60. Plaintiff WILLIAM J. MAHER is a natural person currently residing in California. Plaintiff Maher was prescribed and ingested Plavix and/or Plavix plus aspirin on or around October of 2003 and thereafter. On or Around September of 2005, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Cerebral Bleeding; Gastrointestinal Bleeding; Heart Attack; Stroke. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

61. Plaintiff JOHN L. MCKENZIE is a natural person currently residing in California. Plaintiff McKenzie was prescribed and ingested Plavix and/or Plavix plus aspirin on of around January of 2001 and thereafter. On or Around January of 2006, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

62. Plaintiff JULIANNE NICKS is a natural person currently residing in California. Plaintiff Nicks

was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2000 and thereafter. On or Around February of 2009, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

63. Plaintiff ROLAND ROMERO is a natural person currently residing in California. Plaintiff Romero was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2004 and thereafter. On or Around January of 2008, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

64. Plaintiff DANIEL M. RUECKER is a natural person currently residing in California. Plaintiff Ruecker was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2007 and thereafter. On or Around January of 2010, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

65. Plaintiff ROLIN T. RUTHERFORD is a natural person currently residing in Kentucky. Plaintiff Rutherford was prescribed and ingested Plavix

and/or Plavix plus aspirin on or around August of 2010 and thereafter. On or Around April of 2011, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

66. Plaintiff BONNIE RUTHERFORD is a natural person and spouse of Plaintiff ROLIN T. RUTHERFORD.

67. Plaintiff MARY L. SHEPHARD is a natural person currently residing in Oklahoma. Plaintiff Shephard was prescribed and ingested Plavix and/or Plavix plus aspirin on or around February of 2010 and thereafter. On or Around March of 2010, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

68. Plaintiff KEVIN M. SHEPHARD is a natural person and spouse of Plaintiff MARY L. SHEPHARD.

69. Plaintiff DONALD L. SOUZA is a natural person currently residing in California. Plaintiff Souza was prescribed and ingested Plavix and/or Plavix plus aspirin on or around April of 2002 and thereafter. On or Around December of 2008, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Cerebral Bleeding; Gastrointestinal Bleeding. Plaintiff

was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

70. Plaintiff DONG TUNISON is a natural person currently residing in California. Plaintiff Tunison was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2006 and thereafter. On or Around September of 2008, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Gastrointestinal Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

71. Plaintiff GARY J. VAN DYKE is a natural person currently residing in Indiana. Plaintiff Van. Dyke was prescribed and ingested Plavix and/or Plavix plus aspirin on or around May of 2003 and thereafter. On or Around January of 2005, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Cerebral Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

72. Plaintiff DOROTHY VANCE is a natural person currently residing in California. Plaintiff Vance was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2007 and thereafter. On or Around February of 2010, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding. Plaintiff was unaware the Plaintiff's inju-

ries were caused by Plavix until within two years of filing this complaint.

73. Plaintiff EDWARD VANCE is a natural person and spouse of Plaintiff DOROTHY VANCE.

74. Plaintiff REX A. VICTORY is a natural person currently residing in Oklahoma. Plaintiff Victory was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2008 and thereafter. On or Around March of 2009, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers; Heart Attack. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

75. Plaintiff MARILYN VICTORY is a natural person and spouse of Plaintiff REX A. VICTORY.

76. Plaintiff ANTHONY G. WILLIAMS is a natural person currently residing in Indiana. Plaintiff Williams was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2006 and thereafter. On or Around March of 2008, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Cerebral Bleeding. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

77. Plaintiff DONALD E. WITT is a natural person currently residing in Indiana. Plaintiff Witt was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2000 and thereafter. On or Around June of 2004, Plaintiff suffered severe physical, economic and emotional injuries as a result

of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Hematoma. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

78. Plaintiff PHYLLIS WITT is a natural person and spouse of Plaintiff DONALD E. WITT.

79. Plaintiff JAMES WOODMANSEE is a natural person currently residing in Indiana. Plaintiff Woodmansee was prescribed and ingested Plavix and/or Plavix plus aspirin on or around April of 2007 and thereafter. On or Around May of 2009, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Bleeding Ulcers. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

80. Plaintiff SHARON M. WOODMANSEE is a natural person and spouse of Plaintiff JAMES WOODMANSEE.

81. Plaintiff EVELYN L. ZAWICKI is a natural person currently residing in Oklahoma. Plaintiff Zawicki was prescribed and ingested Plavix and/or Plavix plus aspirin on or around January of 2006 and thereafter. On or Around April of 2008, Plaintiff suffered severe physical, economic and emotional injuries as a result of said Plavix and/or Plavix and aspirin dual therapy, including but not limited to Cerebral Bleeding; Stroke. Plaintiff was unaware the Plaintiff's injuries were caused by Plavix until within two years of filing this complaint.

82. Plaintiff MICHAEL G. ZAWICKI is a natural person and spouse of Plaintiff EVELYN L. ZAWICKI.

83. As used herein, "Ingesting Plaintiffs" shall mean to refer to the plaintiffs identified herein as someone who was prescribed and ingested Plavix.

84. As used herein, "Spouse Plaintiffs" shall mean to refer to the plaintiffs identified herein as the spouse of someone who was prescribed and ingested Plavix.

## DEFENDANTS

85. Defendant McKesson Corporation is a pharmaceutical distribution and marketing company organized and existing under the laws of the State of Delaware, with its headquarters at One Post Street, San Francisco, California 94104.

86. Defendant, Bristol-Myers Squibb Company (hereinafter referred to as "BMS" or "Manufacturing Defendant(s)") is a pharmaceutical manufacturing and marketing company that manufactures and markets Plavix in the United States. The headquarters for Bristol-Myers Squibb Company is located at 345 Park Avenue, New York, New York, 10145-0037.

87. When referring collectively to all Defendants in this action, Plaintiffs will use the term "Defendants".

## FACTUAL ALLEGATIONS

88. This is an action for injuries and damages suffered by Plaintiffs, and each of them, as a direct and proximate result of the Defendants' negligent and wrongful conduct in connection with the design, development, manufacture, testing, packaging, promoting, marketing, distribution, labeling, and/or sale of Plavix.

89. Plavix was designed, developed, manufactured, tested, labeled, packaged, promoted, marketed, distributed, and/or sold by Defendants.

90. Manufacturing Defendants applied in April 1997 for a priority regulatory review by the Food and Drug Administration ("FDA"), which cleared the path for Defendants to bring Plavix to market in November 1997.

91. As set forth more fully below, Manufacturing Defendants rushed to obtain FDA approval of Plavix, with an emphasis on generating immediate and maximum profit that comprised the safety of Ingesting Plaintiffs and the general public.

92. Plavix was heavily marketed directly to consumers through television, magazine and internet advertising. It was falsely represented as providing greater cardiovascular benefits, while being safer and easier on a person's stomach than aspirin than a much less expensive daily aspirin regimen. At all material times, Defendants knew those assertions were utterly without merit.

93. Throughout the time Ingesting Plaintiffs were prescribed and injured by Plavix, Defendants knew or should have known and failed to disclose that Plavix is not more efficacious than aspirin to prevent heart attacks and strokes. Moreover, Defendants knew or should have known that when taking Plavix, the risk of suffering a heart attack, stroke, internal bleeding, blood disorder, or death far outweighs any potential benefit.

94. Throughout the time Ingesting Plaintiffs were prescribed and injured by Plavix, Manufacturing Defendants continued to exaggerate the results of its own studies and to make false statements in their

advertising and promotional materials for the purpose of increasing their profits from the sale of Plavix.

95. The profits at stake for Plavix are enormous. In 2010, Plavix was the Defendants' top selling drug, with annual net sales in the United States of approximately $6,200,000,000.00 (a 63% increase from of $3,800,000,000.00 in 2005).

96. Defendants repeatedly disregarded their duty to tell Ingesting Plaintiffs and the general public the truth about the dangerous health risks associated with Plavix.

97. Throughout the time Ingesting Plaintiffs were prescribed and injured by Plavix, Defendants promotional materials made unsubstantiated claims about the benefits of Plavix that were false and misleading. Specifically, the Manufacturing Defendants' promotional material misled consumers about its own study, called CAPRIE, (Clopidogrel versus Aspirin in Patients at Risk of Ischemic Events). While the Defendants' embellished promotional material claimed that Plavix was 19.2% better than Aspirin, the actual findings of the CAPRIE study were that Plavix was not proven to be significantly more effective than aspirin-providing a 2.9% reduction in ischemic events versus a 3.47% reduction of ischemic events for the study participants who had been given aspirin.

98. In addition to misinforming physicians and the public through their advertising to consumers and promotional materials for doctors, Defendants' drug representatives have also misinformed physicians about the which types of patients who should be given Plavix, the duration of its proper usage, and the applications for which it is safe and approved.

99. Defendants, through their drug representatives, and their promotional efforts, have encouraged physicians to prescribe Plavix to a broad population of people who would receive the same therapeutic benefit from aspirin alone, (without risking death) and to use Plavix for unapproved applications.

100. The Chan study, published in The New England Journal of Medicine and named for the scientific researcher who conducted it, demonstrated the fallacy of Defendants' assertions that Plavix is safer and more effective for patients who have a gastrointestinal intolerance to aspirin. The Chan study compared the effects of Aspirin and Plavix on patients who had previously had stomach ulcers that had healed. In that group, the incidence of recurring stomach bleeding was 8.6% in the Plavix group versus only .7% in the aspirin group. Dr. Chan recommended that the prescribing guidelines for Plavix be changed so that patients would not erroneously believe that Plavix is safer on the stomach than aspirin.

101. The Chan study also divulged the fact that an aspirin a day plus esomeprazole (the generic name for a cheap, over the counter proton pump inhibitor like Prilosec) is far more cost effective for the consumer than paying for a four- dollar ($4.00) a-day Plavix pill that greatly increases the risk of stomach bleeding.

102. The CHARISMA trial, which was published in the New England Journal of Medicine, in April of 2006 found that Plavix plus aspirin (dual therapy) is only minimally more effective than aspirin plus placebo at preventing atherothrombotic events. But more importantly, the study found that in patients who do not have peripheral arterial disease (PAD) or

acute coronary syndrome (ACS), Plavix plus aspirin (dual therapy) poses a 20% increased risk to the patient of suffering bleeding injuries, heart attacks, stroke and death. In other words, in those patients without ACS or PAD, dual therapy with aspirin and Plavix does more harm than good.

103. Another scientific trial conducted in Europe and published online in the Cardiovascular and Cerebrovascular Disease Journal, investigated the effectiveness of Plavix and aspirin in assisting peripheral artery disease patients improve their pain-free walking distance. The trial found that Plavix was not more effective than aspirin at improving pain-free walking distance.

104. The growing body of scientific knowledge has established that the four-dollar ($4.00) Plavix pill is no better than the four-cent-a-day aspirin pill. However, Defendants have continued to promote Plavix to the public and to physicians without fully disclosing the risks associated with its use.

105. As a direct and proximate result of the aforesaid conduct of Defendants and each of them as set forth hereinafter, Ingesting Plaintiffs suffered injuries, including, but not limited to, bleeding, heart attack and strokes, all to Plaintiffs' damage in the sum in excess of the jurisdictional limits of Court of Limited Jurisdiction.

106. As a direct and proximate result of the aforesaid conduct of the Defendants, and each of them, Ingesting Plaintiffs have been compelled and/or will in the future will be compelled to incur obligations as and for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays, medical supplies and other medical treatment, the true and exact amount

thereof being unknown to Plaintiffs at this time, and Plaintiffs pray leave to amend this complaint accordingly when the true and exact cost thereof is ascertained.

107. As a further direct and proximate result of the said conduct of the Defendants, and each of them, Ingesting Plaintiffs have and/or in the future will incurred, loss of income, wages, profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiffs; and leave is requested to amend this complaint to conform to proof at the time of trial.

108. By reasons of the premises, Ingesting Plaintiffs have been caused great pain and suffering.

## FIRST CAUSE OF ACTION

[Strict Products Liability – Design Defect]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR STRICT PRODUCTS LIABILITY- DESIGN DEFECT ALLEGE AS FOLLOWS:

109. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further alleges as follows:

110. The Plavix manufactured and supplied by Defendants was defective and unsafe for its intended purpose in that the ingestion of Plavix causes serious injuries and/or death. The defect existed in said product at the time it left the possession of the Defendants and each of them. Said product did, in fact, cause personal injuries as described herein while being used in a reasonably foreseeable manner, thereby

rendering the same defective, unsafe, and dangerous for use.

111. The Plavix manufactured and supplied by Defendants was placed into the stream of commerce by Defendants in a defective and unreasonably dangerous condition in that the foreseeable risks exceeded the benefits associated with the design or formulation.

112. Alternatively, the Plavix manufactured and supplied by Defendants was defective in design or formulation in that when it was placed in the stream of commerce in that it failed to perform as safely as an ordinary consumer would expect and was more dangerous than other anticoagulant therapies.

113. The Plavix manufactured and supplied by Defendants was also defective due to inadequate warning or instruction because the Defendants knew or should have known that the product created a serious risk of harm to consumers and Defendants failed to adequately warn consumers of said risks, including Ingesting Plaintiffs.

114. Defendants, and each of them, knew and intended that Plavix would be used by the ordinary purchaser or user without inspection for defects therein and without knowledge of the hazards involved in such use.

115. The Plavix manufactured and supplied by Defendants was defective due to inadequate warning and inadequate testing.

116. The Plavix manufactured and supplied by Defendants was defective due to inadequate post-market warnings and instructions, because Defendants knew or should have know of the risk of serious

injury from Plavix, however said Defendants failed to provide adequate warnings to users and consumers of the product, including Ingesting Plaintiffs, and continued to promote the product.

117. On or before all times relevant to this matter, Defendants, and each of them, were aware that members of the general public, including Ingesting Plaintiffs, who would ingest their product had no knowledge or information indicating that use of their product could cause injury, and said Defendants, and each of them, knew that members of the general public, including ingesting Plaintiffs, who used their product, would assume, and in fact did assume, that said use was safe, when in fact said use was extremely hazardous to health and human life.

118. With said knowledge, said Defendants, and each of them, opted to manufacture, design, label, distribute, offer for sale, supply, sell, package, and advertise said product without attempting to protect said product users from, or warn of, the high risk of injury or death resulting from its use.

119. Rather than attempting to protect users from, or warn them of, the high risk of injury or death resulting from use of their product, Defendants, and each of them, intentionally failed to reveal their knowledge of said risk, failed to warn of said risk and consciously and actively concealed and suppressed said knowledge from members of the general public, including Ingesting Plaintiffs, thus impliedly representing to members of the general public that Plavix was safe for all reasonably foreseeable uses.

120. The above-referenced conduct of said Defendants, and each of them, was motivated by the financial interest of said Defendants, in the continuing,

uninterrupted manufacture, supply, sale, marketing, packaging and advertising of Plavix.

121. In pursuance of said financial motivation, Defendants, and each of them, consciously disregarded the safety of users of their product and in fact were consciously willing and intended to permit Plavix to cause injury to users and induced persons to purchase and use Plavix, including Plaintiffs herein.

122. Defendants, their "alternate entities," and each of them, and their officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and had full knowledge of, or should have known of, each of the acts set forth herein.

123. The herein-described conduct of said Defendants, and each of them, was and is willful, malicious, fraudulent, outrageous and in conscious disregard and indifference to the safety and health of the users of their product. Ingesting Plaintiffs for the sake of example and by way of punishing said defendants, seeks punitive damages according to proof.

124. As a proximate and legal result of the defective and unreasonably dangerous condition of Plavix tested, manufactured and supplied by Defendants, and the lack of adequate use instructions and warnings, said Plaintiffs were caused to suffer the herein described injuries and damages.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as hereinafter set forth.

SECOND CAUSE OF ACTION

[Strict Liability – Manufacturing Defect]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR STRICT PRODUCTS LIABILITY-MANUFACTURING DEFECT ALLEGE AS FOLLOWS:

125. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

126. At all times herein mentioned, Defendants' Plavix products were prescribed and used as intended by Defendants and in a manner reasonably foreseeable to Defendants.

127. The Plavix products were defective at the time of their manufacture, development, production, testing, inspection, endorsement, prescription, sale and distribution, and at the time they left the possession of the Defendants, in that, and not by way of limitation, the products differed from the Defendants' intended result and intended design and specifications, and from other ostensibly identical units of the same product line.

128. As a proximate and legal result of the defective condition of the Plavix, said Plaintiffs were caused to suffer and will continue to suffer the herein described injuries and damages.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as hereinafter set forth.

## THIRD CAUSE OF ACTION

[Negligence]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR NEGLIGENCE ALLEGE AS FOLLOWS:

129. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

130. Defendants had a duty to exercise reasonable care in the manufacture, sale and/or distribution of Plavix into the stream of commerce, including a duty to assure that the product did not cause users to suffer from unreasonable, dangerous side effects.

131. Defendants failed to exercise ordinary care in the manufacture, sale, testing, quality assurance, quality control, and/or distribution of Plavix into interstate commerce in that Defendants knew or should have known that Plavix created a high risk of unreasonable, dangerous side effects.

132. Defendants were negligent in the designing, manufacture, testing, advertising, warning, marketing and sale of Plavix.

133. Despite the fact that Defendants knew or should have known that Plavix caused unreasonable, dangerous side effects, Defendants continued to market the Plavix to consumers including Ingesting Plaintiff.

134. Defendants knew or should have known that consumers such as Ingesting Plaintiff would foreseeably suffer injury as a result of Defendants' failure to exercise ordinary care as described above.

135. Defendants willfully and deliberately failed to avoid those consequences, and in doing so, Defendants acted with a conscious disregard of the safety of Ingesting Plaintiff as alleged previously.

136. As a proximate and legal result of Defendants' negligence, said Plaintiffs were caused to suffer the herein described injuries and damages.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as herein set forth.

FOURTH CAUSE OF ACTION

[Breach of Implied Warranty]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR BREACH OF IMPLIED WARRENTY ALLEGE AS FOLLOWS:

137. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

138. At all times mentioned in this Complaint, Defendants manufactured, compounded, packaged, distributed, recommended, merchandised, advertised, promoted, supplied and sold Plavix, and prior to the time it was prescribed to Ingesting Plaintiffs, Defendants impliedly warranted to Ingesting Plaintiffs, and their physicians and healthcare providers, that Plavix was of merchantable quality and safe for the use for which it was intended.

139. Ingesting Plaintiffs and their physicians and healthcare providers relied on the skill and judgment of the Defendants in using Plavix.

140. The product was unsafe for its intended use, and it was not of merchantable quality, as warranted

by Defendants, in that it had very dangerous propensities when put to its intended use and would cause severe injury to the user. Plavix was unaccompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution.

141. As a proximate and legal result of the defective and unreasonably dangerous condition of Plavix manufactured and supplied by Defendants, Plaintiffs were caused to suffer and will continue to suffer the herein described.

142. After Plaintiffs were made aware that their injuries were a result of Plavix, notice was duly given to Defendants of the breach of said warranty.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as hereinafter set forth.

FIFTH CAUSE OF ACTION

[Breach of Express Warranty]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR BREACH OF EXPRESS WARRANTY ALLEGE AS FOLLOWS:

143. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

144. The aforementioned manufacturing, compounding, packaging, designing, distributing, testing, constructing, fabricating, analyzing, recommending, merchandizing, advertising, promoting, supplying and selling of Plavix was expressly warranted to be safe for use by Ingesting Plaintiffs, and other members of the general public.

145. At the time of the making of the express warranties, Defendants had knowledge of the purpose for which Plavix was to be used and warranted the same to be in all respects, fit, safe, and effective and proper for such purpose. Plavix was unaccompanied by warnings of its dangerous propensities that were either known or knowable at the time of distribution.

146. Ingesting Plaintiffs and their physicians reasonably relied upon the skill and judgment of Defendants, and upon said express warranty, in using Plavix. The warranty and representations were untrue in that the product was unsafe and, therefore, unsuited for the use for which it was intended. Plavix could and did thereby cause Plaintiffs to suffer and continue to suffer the herein described injuries and damages.

147. As soon as the true nature of the product and the fact that the warranty and representations were false were ascertained, Defendants was notified of the breach of said warranty.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as hereinafter set forth.

SIXTH CAUSE OF ACTION

[Deceit by Concealment –
Cal. Civ. Code §§ 1709, 1710]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR DECEIT BY CONCEALMENT ALLEGE AS FOLLOWS:

148. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

149. California Civil Code section 1709 provides that one who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers.

150. California Civil Code section 1710 provides, in part, that a deceit, within the meaning of section 1709, is the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing t to be true; or the suppression of fact, by one who is found to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact.

151. The Defendants, and each of them, from the time that the Plavix was first tested, studied, researched, evaluated, endorsed, manufactured, marketed and distributed, and up to the present, willfully deceived the Ingesting Plaintiffs, their prescribing physicians and healthcare providers, the medical, scientific, pharmaceutical and healthcare communities, and the public in general, by suggesting to some or all of them untrue facts about their metoclopramide products that they did not believe to be true or had no reasonable ground for believing them to be true, and by concealing from them the true facts concerning such products, which the Defendants had a duty to disclose.

152. At the time Plavix was manufactured, distributed, and sold to Ingesting Plaintiffs, the Defendants were in a unique position of knowledge, which was not possessed by Ingesting Plaintiffs or their physicians, concerning the safety and effectiveness of the

drug, and thereby held a position of superiority over Ingesting Plaintiffs and their physicians.

153. Through their unique knowledge and expertise regarding the defective nature of Plavix, and through their marketing statements to physicians and patients in advertisements, promotional materials, labels and other communications as herein alleged, Defendants professed to Plaintiffs' physicians that they were in possession of facts demonstrating that Plavix was safe and effective for its intended use and was not defective, when in fact they were not, and in fact possessed information they did not disclose that they had a duty to disclose to ensure such physicians were not misled.

154. Defendants knew or had no reasonable ground to believe the truth of their representations to Ingesting Plaintiffs' physicians. Such representations were made to induce the purchase of Plavix and/or metoclopramide, and Ingesting Plaintiffs and their physicians relied upon those statements when purchasing and administering Plavix.

155. Defendants took unconscionable advantage of their dominant position of knowledge with regard to Ingesting Plaintiffs and their physicians and engaged in constructive fraud in their relationship.

156. Ingesting Plaintiffs and their physicians reasonably relied on these misrepresentations and misleading facts.

157. The Defendants intentionally concealed and suppressed the true facts concerning the Plavix with the intent to defraud the Ingesting Plaintiffs, their prescribing physicians and healthcare providers, the medical, scientific, pharmaceutical and healthcare communities, and the public in general, in that De-

fendants knew that the physicians and healthcare providers would not have prescribed the Plavix, and Ingesting Plaintiffs would not have used the Plavix if they had known the true facts concerning the dangers of the Plavix.

158. As a result of the foregoing fraudulent and deceitful conduct by Defendants, and each of them, said Plaintiffs were caused to suffer and will continue to suffer the herein described injuries and damages.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as hereinafter set forth.

SEVENTH CAUSE OF ACTION

[Negligent Misrepresentation]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION ALLEGE AS FOLLOWS:

159. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

160. Defendants owed a duty in all of its several undertakings, including the communication of information concerning Plavix, to exercise reasonable care to ensure that it did not, in those undertakings, create unreasonable risks of personal injury to others.

161. Defendants disseminated information to physicians concerning the properties and effects of Plavix, with the intent and expectation that physicians would rely on that information in their decisions regarding the prescribing of drug therapy for their patients.

162. Alternatively or in addition, when Defendants disseminated information to physicians concerning the properties and effects of Plavix, it should have realized, in the exercise of due care to avoid causing personal injury to others, that physicians would reasonably rely on that information in their decisions concerning the prescription of drug therapy for their patients. Defendants knew or should have known that physicians and patients would have no reason to expect a label change, unless they were informed of a change, and thereby misled by omission.

163. By uniformly honored custom and practice, the label for a prescription drug product, whether name brand or generic, as it is distributed to pharmacies for dispensing to patients, per the prescriptions of their physicians, accompanies or is placed on or in the package from which the drug is to be dispensed.

164. A drug company will generally distribute to physicians the labels for a name brand prescription drug product along with samples of the product, when it is being introduced to the market, and disseminate the content of the labels (i.e., the product labeling) to physicians through publication of the drug's monograph in the PDR, and otherwise communicate information regarding the drug through advertising, distribution of promotional materials, sales presentations by company sales representatives, group sales presentations, and sponsored publications and seminar speakers.

165. Defendants disseminated false information, as referenced above, to physicians and the medical community and to their patients) with knowledge that the information was false or in conscious its truth or falsity.

166. Defendants disseminated the false information, as referenced above, to physicians, the medical community and their patients with the intention to deceive physicians and their patients and to induce the physicians to prescribe Plavix. In particular, Defendants induced physicians to prescribe Plavix for prolonged periods of time.

167. Alternatively or in addition, Defendants failed to exercise reasonable care to ensure that the information disseminated to physicians concerning the properties and effects of Plavix was accurate and not misleading, Defendants failed to exercise reasonable care to insure that accurate and not misleading information was disseminated to physicians concerning the properties and effects of Plavix by failing to publish or disseminate current and accurate information.

168. Defendants expected or should have expected that patients taking Plavix, pursuant to prescriptions written or issued in reliance on false information, would be placed in unnecessary, avoidable, and unreasonable danger due to unwarranted exposure to the drug.

169. As a proximate and foreseeable result of this dissemination to physicians, by Defendants consciously or negligently disseminating false information, the Ingesting Plaintiffs suffered grievous bodily injury and consequent economic and other loss, as described above, when their physicians, in reasonable reliance upon the negligently inaccurate, misleading and otherwise false information disseminated by these defendants, and reasonably but unjustifiably believing the information to be true, pre-

scribed for the Ingesting Plaintiffs the use of Plavix for a prolonged and unwarranted period of time.

170. As a result of the foregoing negligent misrepresentations by Defendants, and each of them, said Plaintiffs were caused to suffer and will continue to suffer the herein described injuries and damages.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as hereinafter set forth.

EIGHTH CAUSE OF ACTION

[Fraud by Concealment]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR FRAUD BY CONCEALMENT ALLEGE AS FOLLOWS:

171. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

172. At all times mentioned in this Complaint, Defendants had the duty and obligation to disclose to Ingesting Plaintiffs and to their physicians, the true facts concerning Plavix, that is, that Plavix was dangerous and defective, and likely to cause serious health consequences to users, including the injuries as described in this Complaint.

173. Defendants concealed important facts from Ingesting Plaintiffs and from their physicians and healthcare providers which facts include, but are not limited to, the fact that Defendants had received numerous adverse events reports resulting in death and hundreds of adverse event reports of serious injury requiring hospitalization during the same

timeframe Ingesting Plaintiffs were prescribed and injured by Plavix.

174. At all times mentioned in this Complaint, Defendants made affirmative representations to Ingesting Plaintiffs and their prescribing physicians prior to the day Plavix was first prescribed to Ingesting Plaintiffs that Plavix was safe as set forth above while concealing the material facts set forth herein.

175. At all times mentioned in this Complaint, Defendants had the duty and obligation to disclose to Ingesting Plaintiffs and to their physicians and healthcare providers the true facts concerning Plavix, which facts include, but are not limited to, the fact that concurrent use with aspirin would cause serious bodily injuries, including, but not limited to, serious abnormal bleeding, TTP, and death.

176. At all times mentioned in this Complaint, Defendants intentionally, willfully, and maliciously concealed or suppressed the facts set forth above from Ingesting Plaintiffs' physicians, and therefore from Plaintiffs, with the intent to defraud as alleged herein.

177. At all times mentioned in this Complaint, neither Ingesting Plaintiffs nor their physicians or healthcare providers were aware of the concealed facts set forth herein. Had they been aware of those facts, they would not have acted as they did, that is, that Plavix would not have been prescribed as part of Ingesting Plaintiffs' treatment and they would not have been injured as a result.

178. Had Ingesting Plaintiffs been informed of the deaths and serious injury adverse reports associated with Plavix usage, they would have immediately discontinued Plavix and/or aspirin.

179. As a proximate result of the concealment or suppression of the facts set forth above, Ingesting Plaintiffs and their physicians and healthcare providers reasonably relied on Defendants' deception and, Ingesting Plaintiffs were prescribed Plavix and subsequently sustained injuries and damages as set forth in this Complaint. Defendants' concealment was a substantial factor in causing Plaintiffs' injuries.

180. As a result of the foregoing fraudulent and deceitful conduct by Defendants, and each of them, Ingesting Plaintiffs, for the sake of example and by way of punishing said defendants, seeks punitive damages according to proof.

181. As a result of the foregoing fraudulent and deceitful conduct by Defendants, and each of them, Plaintiffs were caused to suffer and will continue to suffer the herein described injuries and damages.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as hereinafter set forth.

NINTH CAUSE OF ACTION

[Violations of Bus. & Prof. Code § 17200]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR VIOLATIONS OF THE BUSINESS & PROFESSIONS CODE §17200 ALLEGE AS FOLLOWS:

182. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

183. California Business & Professions Code§ 17200 provides that unfair competition shall mean

and include "all unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising".

184. The acts and practices described above were and are likely to mislead the general public and therefore constitute unfair business practices within the meaning of California Business & Professions Code§ 17200. The acts of untrue and misleading advertising set forth in presiding paragraphs are incorporated by reference and are, by definition, violations of California Business & Professions Code§ 17200. This conduct is set forth fully herein, and includes, but is not limited to:

a. Representing that Plavix is safe, fit, and effective for human consumption, knowing that said representations were false, and concealing that Plavix products had a serious propensity to cause injuries to users;

b. Engaging in advertising programs designed to create the image, impression and belief by consumers and physicians that Plavix is safe for human consumption, even though the Defendants knew this to be false, and even though the Defendants had no reasonable grounds to believe them to be true;

c. Purposely downplaying and understating the health hazards and risks associated with Plavix and aspirin therapy;

d. Issuing promotional literature and commercials deceiving potential users of Plavix by relaying positive information, including testimonials from satisfied users, and manipulating statistics to suggest widespread acceptability, while downplaying the known adverse and serious health effects and

concealing material relevant information regarding the safety and efficacy of Plavix.

e. Engaging in a practice undertaking unlawful, unfair or fraudulent acts by refraining from taking any action that would provide prescribing physicians with appropriate information and protect patients who ingest or use their drugs, including Ingesting Plaintiffs, such as failing to engage in proper pharmacovigilance, signal detection and follow up, review of the literature, regulatory review, updating labels and timely and properly implementing label changes and conducting proper research, tests and studies to ensure the continued safety of their products, and taking appropriate action to disseminate to prescribing physicians and healthcare providers appropriate and permitted product information and labels concerning safety issues and safe prescribing practices for their products.

185. These practices constitute unlawful, unfair and fraudulent business acts or practices, within the meaning of California Business & Professions Code § 17200.

186. The unlawful, unfair and fraudulent business practices of Defendants described above present a continuing threat to members of the public in that Defendants continue to engage in the conduct described therein.

187. As a result of their conduct described above, Defendants have been and will be unjustly enriched. Specifically, Defendants have been unjustly enriched by receipt of hundreds of millions of dollars in ill-gotten gains from the sale and prescription of Defendants' Plavix products in California, sold in large

part as a result of the acts and omissions described herein.

188. Said Plaintiffs, pursuant to California Business & Professions Code§ 17203, seek an order of this court compelling the Defendants to provide restitution and injunctive relief calling for Defendants, and each of them, to cease unfair business practices in the future.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as hereinafter set forth.

## TENTH CAUSE OF ACTION

[Violations of Bus. & Prof. Code § 17500]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR VIOLATIONS OF THE BUSINESS & PROFESSIONS CODE §17500 ALLEGE AS FOLLOWS:

189. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

190. Said Plaintiffs bring this cause of action pursuant to California Business & Professions Code § 17500.

191. California Business & Professions Code § 17500 provides that it is unlawful for any person, firm, corporation or association to dispose of property or perform services, or to induce the public to enter into any obligation relating thereto, through the use of untrue or misleading statements.

192. At all times herein alleged Defendants have committed acts of disseminating untrue and misleading statements as defined by California Business &

Professions Code§ 17500 by engaging in the following acts and practices with intent to induce members of the public to purchase and use Defendants' Plavix product:

a. Representing that Plavix was safe, fit, and effective for human consumption, knowing that said representations were false, and concealing that the Plavix had a serious propensity to cause injuries to users.

b. Engaging in advertising programs designed to create the image, impression and belief by consumers and physicians that Plavix is safe for human consumption, even though the Defendants knew these to be false, and even though the Defendants had no reasonable grounds to believe them to be true.

c. Purposely downplaying and understating the health hazards and risks associated with Defendants' Plavix product.

d. Issuing promotional literature and commercials deceiving potential users of the Plavix by relaying positive information, including testimonials from satisfied users, and manipulating statistics to suggest widespread acceptability, while downplaying the known adverse and serious health effects and concealing material relevant information regarding the safety of Plavix.

e. Engaging in a practice, undertaking unlawful, unfair or fraudulent acts by refraining from taking any action that would provide prescribing physicians with appropriate information and protect patients who ingest or use their drugs, including Ingesting Plaintiffs, such as failing to engaging in proper pharmacovigilance, signal detection and fol-

low up, review of the literature, regulatory review, updating labels and timely and properly implementing label changes by the RLD holders, and conducting proper research, tests and studies to ensure the continued safety of their Plavix products, and taking appropriate action to disseminate to prescribing physicians and healthcare providers appropriate and permitted product information and labels concerning safety issues and safe prescribing practices for their products.

193. The foregoing practices constitute false and misleading advertising within the meaning of California Business & Professions Code § 17500.

194. The acts of untrue and misleading statements by Defendants described herein above present a continuing threat to members of the public in that the acts alleged herein are continuous and ongoing, and the public will continue to suffer the harm alleged herein.

195. As a result of their conduct described above, Defendants have been and will be unjustly enriched. Specifically, Defendants have been unjustly enriched by receipt of hundreds of millions of dollars in ill-gotten gains from the sale and prescription of the Plavix in California, sold in large part as a result of the acts and omissions described herein.

196. Pursuant to California Business & Professions Code § 17535, Plaintiffs seek an order of this court compelling the Defendants to provide restitution and injunctive relief calling for Defendants, and each of them, to cease unfair business practices in the future.

197. Said Plaintiffs seek restitution of the monies collected by Defendants, and each of them, and other

injunctive relief to cease such false and misleading advertising in the future.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as hereinafter set forth.

ELEVENTH CAUSE OF ACTION

[Violations of Cal. Civ. Code § 1750]

INGESTING PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR VIOLATIONS OF CAL. CIVIL CODE §1750 ALLEGE AS FOLLOWS:

198. Ingesting Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

199. Said Plaintiffs are informed and believe and thereon allege that Defendants, and each of them, by the acts and misconduct alleged herein, violated the Consumers Legal Remedies Act, California Civil Code §§ 1750 et. seq. ("CLRA").

200. Said Plaintiffs hereby seek injunctive relief as appropriate against Defendants, and each of them, for their violations of California Civil Code §§ 1750 et. seq. The CLRA applies to Defendants' actions and conduct described herein because it extends to transactions which are intended to result, or which have resulted, in the sale of goods to consumers.

201. Ingesting Plaintiffs and are "consumers" within the meaning of California Civil Code § 1761(d).

202. Defendants have violated, and continue to violate, the CLRA in representing that goods have characteristics and benefits which they do not have, in violation of California Civil Code § 1770(a)(5).

203. At all times herein alleged Defendants have committed acts of disseminating untrue and misleading statements as defined by California Civil Code § 1770, by engaging in the following acts and practices with intent to induce members of the public to purchase and use Plavix:

a. Representing that Defendants' Plavix product is safe, fit and effective for human consumption, and that Defendants' metoclopramide products are safe for human consumption, knowing that said representations were false, and concealing from Ingesting Plaintiffs and Decedents, their physicians and the general public that the metoclopramide products have an increased propensity to cause injuries to users.

b. Engaging in advertising programs designed to create the image, impression and belief by consumers and physicians that Defendants' Plavix product is safe for human consumption, even though Defendants knew these representations to be false, and even though Defendants had no reasonable ground to believe them to be true.

c. Purposely downplaying and understating the health hazards and risks associated with Defendants' Plavix product; and

d. As to all Defendants, engaging in a practice, undertaking unlawful, unfair or fraudulent acts by refraining from taking any action that would provide prescribing physicians with appropriate information and protect patients who ingest or use their drugs, including ingesting Plaintiffs, such as failing to engaging in proper pharmacovigilance, signal detection and follow up, review of the literature, regulatory review, updating labels and, con-

ducting proper research, tests and studies to ensure the continued safety of their Plavix product, and taking appropriate action to disseminate to prescribing physicians and healthcare providers appropriate and permitted product information and labels concerning safety issues and safe prescribing practices for their products.

204. The foregoing practices constitute false and misleading advertising and representations within the meaning of California Civil Code§ 1770. The acts of untrue and misleading statements by Defendants described herein present a continuing threat to members of the public and individual consumers in that the acts alleged herein are continuous and ongoing, and the public and individual consumers will continue to suffer harm as alleged herein. Unless Defendants are enjoined from continuing to engage in these violations of the CLRA, Plaintiffs will continue to be harmed by the wrongful actions and conduct of Defendants. Pursuant to California Civil Code § 1780, said Plaintiffs seek an order of this court for injunctive relief calling for Defendants, and each of them, to cease such deceptive business practices in the future.

WHEREFORE, said Plaintiffs pray for judgment against Defendants as hereinafter set forth.

## TWELFTH CAUSE OF ACTION

[Loss of Consortium]

SPOUSES PLAINTIFFS COMPLAIN OF DEFENDANTS AND DOES 1-100, AND EACH OF THEM, AND FOR A CAUSE OF ACTION FOR LOSS OF CONSORTIUM ALLEGE AS FOLLOWS

205. Spouse Plaintiffs hereby incorporate by reference all previous paragraphs of this Complaint as if fully set forth herein and further allege as follows:

206. This cause of action is asserted by the Spouse Plaintiffs identified previously whose spouses suffered personal injuries as a result of using Defendants' Plavix product, who at all times relevant to this action were, and are now, husband and wife.

207. Subsequent to their injuries, Ingesting Plaintiffs' were and are unable to perform the necessary duties as a spouse and the work and service usually performed in the care, maintenance and management of the family home.

208. Spouse Plaintiffs were unaware the Ingesting Plaintiffs' injuries were caused by Plavix until within two years of filing this complaint.

209. By reason of the injuries sustained by their spouses, the Spouse Plaintiffs have been and will continue to be deprived of the loss of love, companionship, comfort, care, assistance, protection, affection, society, and moral support of their spouses, as to their damage, in an amount presently unknown but which will be proved at the time of trial.

WHEREFORE, said Spouse Plaintiffs pray for judgment against Defendants as hereinafter set forth.

## PRAYER FOR RELIEF

WHEREFORE, Ingesting Plaintiffs pray for judgment against Defendants, and each of them, as follows:

1. For past and future general damages, according to proof;

2. For past and future medical and incidental expenses, according to proof;

3. For past and future loss of earnings and/or earning capacity, according to proof;

4. For future medical monitoring costs, according to proof;

5. For punitive and exemplary damages in an amount to be determined at trial;

6. For injunctive relief, enjoining Defendants from the acts of unfair competition and untrue and misleading advertising;

7. For a disgorgement of profits, according to proof.

8. For such other and further relief as the Court may deem just and proper, including costs and prejudgment interest as provided in C.C.P. section 998, C.C.P. section 1032, and related provisions of law.

WHEREFORE, Spouse Plaintiffs pray for judgment against Defendants, and each of them, as follows:

1. For plaintiff's damages for loss of consortium and/or society according to proof;

2. For such other and further relief as the Court may deem just and proper, including costs and prejudgment interest as provided in C.C.P. section 998, C.C.P. section 1032, and related provisions of law.

DATED: March 12, 2012

NAPOLI BERN RIPKA SHKOLNIK & ASSOCIATES LLP

By: */s/ Kelly A. McMeekin*
Kelly A. McMeekin
Attorney for Plaintiffs

JURY DEMAND

Plaintiffs each demand an individual trial by jury on all issues which may be tried by a jury.

DATED: March 12, 2012

NAPOLI BERN RIPKA SHKOLNIK & ASSOCIATES LLP

By: */s/ Kelly A. McMeekin*
Kelly A. McMeekin
Attorney for Plaintiffs

CHAIR, JUDICIAL COUNCIL OF CALIFORNIA
455 Golden Gate Avenue,
San Francisco, CA 94102-3688

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Coordination Proceeding
Special Title (Rule 3.550)

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PLAVIX PRODUCT AND
MARKETING CASES

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JUDICIAL COUNCIL
COORDINATION PROCEEDING NO. 4748

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**ORDER ASSIGNING COORDINATION TRIAL JUDGE**

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THE PRESIDING JUDGE of the Superior Court of California, County of San Francisco, is hereby authorized to assign this matter to a judge of the court pursuant to Code of Civil Procedure section 404.3 and rule 3.540 of the California Rules of Court to sit as coordination trial judge to hear and determine the coordinated actions listed below, at the site or sites he or she finds appropriate. Immediately upon assignment, the coordination trial judge may exercise all the powers over each coordinated action of a judge of the court in which that action is pending.

## COORDINATED ACTIONS

| COURT | NUMBER | SHORT TITLE |
|---|---|---|
| Superior Court of California County of San Francisco | CGC12519098 | Adams, et al. v. Bristol-Myers Squibb Company, et al. |
| Superior Court of California County of San Francisco | CGC12519101 | Ailes, et al. v. Bristol-Myers Squibb Company, et al. |
| Superior Court of California County of San Francisco | CGC12519105 | Alexander, et al. v. Bristol-Myers Squibb Company, et al. |
| Superior Court of California County of San Francisco | CGC12519085 | Anderson, et al. v. Bristol-Myers Squibb Company, et al. |
| Superior Court of California County of San Francisco | CGC12519102 | Applen, et al. v. Bristol-Myers Squibb Company, et al. |
| Superior Court of California County of San Francisco | CGC12519109 | Bales, et al. v. Bristol-Myers Squibb Company, et al. |
| Superior Court of California County of San Francisco | CGC12519030 | Bryan, et al. v. Bristol-Myers Squibb, et al. |
| Superior Court of California | CGC12519100 | Caouette, et al. v. Bristol-Myers |

| COURT | NUMBER | SHORT TITLE |
|---|---|---|
| County of San Francisco | | Squibb Company, et al. |
| Superior Court of California County of Santa Clara | 112CV224091 | County of Santa Clara, ex rel. Miguel Márquez v. Bristol-Myers Squibb Company, et al. |

The coordination motion judge has designated the Court of Appeal, First Appellate District, as the reviewing court having appellate and writ jurisdiction. (Code Civ. Proc., § 404.2; Cal. Rules of Court, rule 3.505(a).)

Pursuant to rules 3.501 and 3.540 of the California Rules of Court, every paper filed in a coordinated action must be accompanied by proof of submission of a copy thereof to the coordination trial judge at the following address:

Presiding Judge of the Superior Court of California,
County of San Francisco
Civic Center Courthouse
400 McAllister Street
San Francisco, CA 94102-4514

Pursuant to rule 3.511 of the California Rules of Court, a copy of every paper required to be transmitted to the Chair of the Judicial Council must be sent to the following address:

Chair, Judicial Council of California
Administrative Office of the Courts
Attn: Office of Appellate Court Services
(Civil Case Coordination)
455 Golden Gate Avenue, 5th Floor
San Francisco, CA 94102-3688

Petitioner is directed to serve a copy of this order on (1) all parties to the included coordinated actions, and (2) the clerk of each court for filing in each included action, pursuant to rule 3.540(c) of the California Rules of Court.

Dated: April 19, 2013

*/s/*
Chief Justice of California and
Chair of the Judicial Council

SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN FRANCISCO

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Coordination Proceeding
Special Title [Rule 3.550]

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PLAVIX PRODUCT AND MARKETING CASES

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This document relates to Nos.
CGC-12-519030; CGC-12-519085; CGC-12-519098;
CGC-12-519100; CGC-12-519101; CGC-12-519102;
CGC-12-519105; and CGC-12-519109

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JUDICIAL COUNCIL
COORDINATED PROCEEDING NO. 4748

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**NOTICE OF MOTION AND DEFENDANT BRISTOL-MYERS SQUIBB COMPANY'S MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION**

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Date: September 23, 2013
Time: 9:30 a.m.
Dept: 305
Judge: Hon. John E. Munter
Trial Date: None set

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 23, 2013, at 9:30 a.m., or as soon thereafter as this mat-

ter may be heard in Department 305 in the San Francisco Superior Court; located at 400 McAllister Street, San Francisco, CA 94102, Defendant Bristol-Myers Squibb Company ("BMS") will, and hereby does, move the Court for an Order quashing service of the summons and complaint for lack of personal jurisdiction in these cases.

In March 2012, eight identical complaints involving the prescription drug Plavix®, were filed in this Court against BMS. Although styled as eight collective actions, the actions all assert the individual product liability claims of 659 individual Plaintiffs. The majority of the Plaintiffs in the eight cases -- 575 of 659 -- are not residents of California and do not allege any connection with the State or with each other. BMS brings this Motion as to the entire complaint in all eight cases, and to each and every cause of action therein on the ground that the Court lacks personal jurisdiction over BMS with respect to the claims of the 575 Plaintiffs in these suits who do not reside in California and whose claims have no relation to California. The Court's Order should be without prejudice to Plaintiffs re-filing a complaint that is limited to claims over which the Court has personal jurisdiction.

This Motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the Declarations of Glenn Gerecke, Paul Anthony, and Elena R. Cordero filed herewith, on the complete record in these eight identical Plavix® cases pending in this Court, on the arguments of counsel, and on all other authority and argument upon which the Court may rely. BMS has filed with this Motion a proposed Order for the Court's consideration.

Dated: July 9, 2013

Respectfully Submitted,
ARNOLD & PORTER LLP

By: */s/ Sharon D. Mayo*
Maurice A. Leiter
Michael J. Baker
Sharon D. Mayo
Jeremy M. McLaughlin
Steven G. Reade
Sara C. Duncan
Attorneys for Bristol-Myers Squibb Company

## DECLARATION OF GLENN GERECKE

Glenn Gerecke, being duly sworn, declares as follows:

1. I am Vice President, Engineering and Facilities Services, for Bristol-Myers Squibb Company ("BMS"), and submit this Declaration in support of BMS' motion to dismiss the out-of-state Plaintiffs for lack of personal jurisdiction. The facts set forth in this Declaration are based on my personal knowledge and if sworn as a witness, I can testify competently thereto.

2. BMS' headquarters is located in New York City. The Company maintains substantial operations in New Jersey, including five operating facilities and major research and development campuses in Hopewell, New Brunswick, Nassau Park, Lawrenceville, and Plainsboro.

3. BMS operates five offices in California that employ approximately 164 people. In addition, BMS employs approximately 250 sales representatives who serve in California. One of BMS's offices, in Milpitas, is owned by BMS, and the remainder are leased. The Milpitas facility is used primarily for research and employs 85 people. Three other offices are primarily used as research and laboratory facilities. They are located in Aliso Viejo, San Diego and Sunnyvale. A small office in Sacramento is used by the company's Government Affairs group.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Sandwich, Massachusetts.

Date: 28 Sept 2012

*/s/ Glenn Gerecke*
Glenn Gerecke

## DECLARATION OF PAUL ANTHONY

Paul Anthony, being duly sworn, declares follows:

1. I am Senior Vice President, Human Resources, Commercial Operations and Talent Management, for Bristol-Myers Squibb Company ("BMS"), and submit this Declaration in support of BMS' motion to dismiss the out-of-state Plaintiffs for lack of personal jurisdiction. The facts set forth in this Declaration are based on my personal knowledge and if sworn as a witness, I can testify competently thereto.

2. BMS has approximately 6,475 employees in the New York/New Jersey area. This comprises approximately 51 percent of its 12,598 total United States employees.

3. Less than eleven percent of BMS' sales force covers any part of California.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Lawrenceville, New Jersey.

Date: 9/27/12

*/s/ Paul Anthony*
Paul Anthony

## DECLARATION OF ELENA R. CORDERO

Elena R. Cordero, being duly sworn, declares as follows:

1. I am Executive Director, Plavix Marketing, for Bristol-Myers Squibb Company ("BMS"), and submit this Declaration in support of BMS' motion to dismiss the out-of-state Plaintiffs for lack of personal jurisdiction. The facts set forth in this Declaration are based on my personal knowledge and if sworn as a witness, I can testify competently thereto.

2. Through the Bristol-Myers Squibb/Sanofi Pharmaceuticals Partnership, BMS manufactures Plavix® and sells that drug in, among other places, the United States. BMS' work on the development, manufacture, labeling, and marketing of, and securing regulatory approvals for Plavix® was performed or directed from BMS' New York headquarters and/or its New Jersey operating facilities.

3. None of the work to develop Plavix® took place in California. Nor has BMS ever manufactured Plavix® in California. None of the work related to the labeling, packaging, regulatory approval, or development and direction of the advertising or marketing strategy for Plavix® was accomplished or directed by employees working in California.

4. In the twelve months ending July 2012, BMS derived only 1.1 percent of its total U.S. sales revenue from California sales of Plavix®.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Plainboro, New Jersey.

Date: Sept 27, 2012

*/s/ Elena R. Cordero*
Elena R. Cordero

SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN FRANCISCO

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PLAVIX PRODUCT AND MARKETING CASES

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This document relates to Case Nos.
CGC-12-519030; CGC-12-519085; CGC-12-519098;
CGC-12-519100; CGC-12-519101; CGC-12-519102;
CGC-12-519105; and CGC-12-519109

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JUDICIAL COUNCIL
COORDINATED PROCEEDING NO. 4748

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**DECLARATION OF JOSHUA C. EZRIN IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS FOR LACK OF PERSONAL JURISDICTION**

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Date: September 23, 2013
Time: 9:30 a.m.
Dept: 305
Judge: Hon. John E. Munter
Trial Date: None set

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I, Joshua C. Ezrin, hereby declare,

1. I am an attorney licensed to practice before all Courts of the State of California and am an associate in the law firm of Audet & Partners, LLP, located at 221 Main Street, Suite 1460, San Francisco, attorneys for Plaintiffs and all others similarly situated in the above-entitled matter.

2. The matters referred to in this declaration are based upon my personal knowledge, except where otherwise indicated and, if called as a witness, I could and would testify competently thereto.

3. According to documents produced by Bristol-Myers Squibb Company ("BMS"), it sold $917,707,457.22 worth of Plavix in California between mid-2006 through 2012. Attached hereto as Exhibit A is a true and correct copy of PLAV_BMS_CA 00000007.

4. According to documents produced by BMS, it sold 196,982,680 pills of Plavix at an undeclared value between 1998 and mid-2006. Attached hereto as Exhibit B is a true and correct copy of PLAV_BMS_CA 00000003-6.

5. Attached as Exhibit C is a true and correct copy of BMS's Response to Requests for Production and Response to Special Interrogatories.

6. Attached as Exhibit D is a true and correct copy of the California Secretary of States' website listing for BMS' Agent for Service of Process in California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 2, 2013 in San Francisco, California.

*/s/ Joshua C. Ezrin*
Joshua C. Ezrin

# EXHIBIT A

## Sales of Plavix to Distributors and Wholesalers in California, September 1, 2006 – November 28, 2012

| Year | Sold To Customer | Pill Quantity | Invoice Amount |
|---|---|---|---|
| 2006 | AMERISOURCE-BERGEN | 3,304,840 | $12,872,235.07 |
| 2006 | CARDINAL HEALTH | 57,600 | $224,358.30 |
| 2006 | H D SMITH WHLSE DRUG | 509,740 | $1,985,372.57 |
| 2006 | PSS WORLD MEDICAL | 120 | $467.36 |
| 2006 | VALLEY WHOLESALE DRUG CO | 105,480 | $410,843.46 |
| **2006 Total** | | **3,977,780** | **$15,493,276.76** |
| 2007 | AMERISOURCE-BERGEN | 26,514,880 | $104,005,238.66 |
| 2007 | CARDINAL HEALTH | 507,280 | $2,001,704.94 |
| 2007 | H D SMITH WHLSE DRUG | 2,320,400 | $9,084,945.82 |
| 2007 | MCKESSON CORPORATION | 2,000 | $33,186.20 |
| 2007 | VALLEY WHOLESALE DRUG CO | 378,280 | $1,478,032.71 |
| **2007 Total** | | **29,722,840** | **$116,603,108.33** |
| 2008 | AMERISOURCE-BERGEN | 32,135,450 | $136,751,218.32 |
| 2008 | CARDINAL HEALTH | 363,600 | $1,516,487.08 |
| 2008 | H D SMITH WHLSE DRUG | 742,960 | $3,010,436.06 |
| 2008 | H D SMITH WHLSL DRUG CO | 1,627,560 | $6,883,639.08 |
| 2008 | VALLEY WHOLESALE DRUG CO | 373,440 | $1,599,537.88 |
| **2008 Total** | | **35,243,010** | **$149,721,318.42** |

| Year | Sold To Customer | Pill Quantity | Invoice Amount |
|---|---|---|---|
| 2009 | AMERISOURCE-BERGEN | 32,668,790 | $152,022,572.26 |
| 2009 | H D SMITH WHLSL DRUG CO | 2,443,180 | $11,239,019.77 |
| 2009 | VALLEY WHOLESALE DRUG CO | 351,400 | 1,612,066.86 |
| **2009 Total** | | **35,463,370** | **$164,873,658.89** |
| 2010 | AMERISOURCE-BERGEN | 34,308,270 | $179,974,800.07 |
| 2010 | CARDINAL HEALTH | 36,000 | $186,456.00 |
| 2010 | H D SMITH WHLSL DRUG CO | 2,501,140 | $12,861,431.77 |
| 2010 | VALLEY WHOLESALE DRUG CO | 354,580 | $1,827,590.90 |
| **2010 Total** | | **37,199,990** | **$194,850,278.74** |
| 2011 | AMERISOURCE-BERGEN | 31,826,820 | $192,221,934.77 |
| 2011 | H D SMITH WHLSL DRUG CO | 2,258,020 | $13,584,491.07 |
| 2011 | MCKESSON CORPORATION | 900,720 | $4,894,412.40 |
| 2011 | VALLEY WHOLESALE DRUG CO | 322,880 | $1,943,748.33 |
| **2011 Total** | | **35,308,440** | **$212,644,586.57** |
| 2012 | AMERISOURCE-BERGEN | 8,937,420 | $57,842,313.02 |
| 2012 | CARDINAL HEALTH | 9,640 | $62,183.67 |
| 2012 | H D SMITH WHLSL DRUG CO | 765,900 | $4,935,992.55 |
| 2012 | VALLEY WHOLESALE DRUG CO | 99,420 | $640,740.27 |
| **2012 Total** | | **9,812,380** | **$63,481,229.51** |
| **Grand Total** | | **186,727,810** | **$917,667,457.22** |

# EXHIBIT B

## Sales of Plavix to Distributors and Wholesalers in California, 1998 – August 31, 2006

| Year | Sold To Customer | Pill Quantity |
|---|---|---|
| 1998 | AMERISOURCE CORPORATION | 13,960 |
| 1998 | AMERISOURCE LOS ANGELES | 2,640 |
| 1998 | APLC AMERICAN DRUG/SAV-ON | 124,320 |
| 1998 | BARNES WHOLESALE INC | 56,160 |
| 1998 | BERGEN BRUNSWIG | 1,390,080 |
| 1998 | BINDLEY WESTERN DRUG CO | 196,000 |
| 1998 | CARDINAL HEALTH | 145,940 |
| 1998 | LONGS DRUG STORE NO 882 | 303,000 |
| 1998 | MC KESSON DRUG CO | 263,960 |
| 1998 | PROFESSIONAL WHSLE INC | 4,440 |
| 1998 | TERRACE PHCY | 180 |
| 1998 | THRIFTY PAYLESS /RITE AID | 44,400 |
| 1998 | VALLEY WHLSE DRUG CO | 21,840 |
| 1998 | WALMART PHCY WHSE #32 | 183,600 |
| 1998 | WHITMIRE DC-DBA:CARD HLTH | 65,160 |
| 1998 | WHITMIRE DIST | 78,840 |
| 1998 | WHITMIRE DIST CORP | 112,840 |
| 1998 | WHITMIRE DISTRIBUTION CO | 140,940 |
| **1998 Total** | | **3,148,340** |
| 1999 | AMERISOURCE CORPORATION | 154,920 |
| 1999 | AMERISOURCE LOS ANGELES | 264,280 |
| 1999 | BARNES WHOLESALE INC | 241,560 |
| 1999 | BERGEN BRUNSWIG | 5,395,000 |
| 1999 | BINDLEY WESTERN DRUG CO | 878,040 |
| 1999 | CALEXICO PHARMACY | 10,800 |

| Year | Sold To Customer | Pill Quantity |
|---|---|---|
| 1999 | CARDINAL HEALTH | 594,840 |
| 1999 | DR K C HUNG | 450 |
| 1999 | INDIAN HLTH COUNCIL PHCY | 450 |
| 1999 | KAISER FNDT HOSP PHCY | 7560 |
| 1999 | KAISER REDWOOD CITY | 1080 |
| 1999 | LONGS DRUG STORE NO 882 | 425,880 |
| 1999 | MC KESSON DRUG CO | 2,400 |
| 1999 | PRESCRIPTION SOLUTIONS | 14,040 |
| 1999 | PROFESSIONAL WHSLE INC | 17,280 |
| 1999 | SOUTHERN INDIAN HEALTH | 270 |
| 1999 | VALLEY WHLSE DRUG CO | 74,520 |
| 1999 | WALMART PHCY WHSE #32 | 587,160 |
| 1999 | WHITMIRE DC-DBA:CARD HLTH | 389,880 |
| 1999 | WHITMIRE DIST CORP | 253,440 |
| 1999 | WHITMIRE DISTRIBUTION CO | 598,760 |
| **1999 Total** | | **9,912,610** |
| 2000 | AMERISOURCE CORPORATION | 268,200 |
| 2000 | AMERISOURCE LOS ANGELES | 935,440 |
| 2000 | BARNES WHOLESALE INC | 388,440 |
| 2000 | BERGEN BRUNSWIG | 10,262,080 |
| 2000 | BINDLEY WESTERN DRUG CO | 1,062,560 |
| 2000 | CALEXICO PHARMACY | 1,080 |
| 2000 | CARDINAL HEALTH | 992,160 |
| 2000 | CURSON PHARMACY | 2,160 |
| 2000 | INDIAN HLTH COUNCIL PHCY | 720 |
| 2000 | KAISER FNDN HOSPITAL PHCY | 4,000 |
| 2000 | PRESCRIPTION SOLUTIONS | 38,880 |
| 2000 | PROFESSIONAL WHSLE INC | 29,160 |
| 2000 | SOUTHERN INDIAN HEALTH | 150 |
| 2000 | UNIV OF CALIFORNIA | 600 |
| 2000 | VALLEY WHLSE DRUG CO | 160,200 |

| Year | Sold To Customer | Pill Quantity |
|---|---|---|
| 2000 | WALMART PHCY WHSE #32 | 660,600 |
| 2000 | WHITMIRE DC-DBA:CARD HLTH | 285,480 |
| 2000 | WHITMIRE DIST CORP | 460,540 |
| 2000 | WHITMIRE DISTRIBUTION CO | 1,533,480 |
| **2000 Total** | | **17,085,930** |
| 2001 | AMERISOURCE CORPORATION | 290,320 |
| 2001 | AMERISOURCE LOS ANGELES | 1,282,960 |
| 2001 | BARNES WHOLESALE INC | 522,600 |
| 2001 | BERGEN BRUNSWIG | 6,932,920 |
| 2001 | BINDLEY WESTERN DRUG CO | 467,540 |
| 2001 | CARDINAL HEALTH | 2,001,620 |
| 2001 | KAISER REDWOOD CITY HOSP | 200 |
| 2001 | MCKEE MEDICAL PHCY | 2,160 |
| 2001 | PDI ENTERPRISES INC | 2,880 |
| 2001 | PHOENIX PHARMACY | 500 |
| 2001 | PROFESSIONAL WHSLE INC | 24,120 |
| 2001 | VALLEY WHLSE DRUG CO | 214,920 |
| 2001 | WHITMIRE DIST CORP | 1,052,580 |
| 2001 | WHITMIRE DISTRIBUTION CO | 1,902,060 |
| **2001 Total** | | **14,727,380** |
| 2002 | AMERISOURCE CORPORATION | 200,280 |
| 2002 | AMERISOURCE LOS ANGELES | 910,640 |
| 2002 | AMERISOURCEBERGEN DRUG CO | 1,764,320 |
| 2002 | BARNES WHOLESALE INC | 586,900 |
| 2002 | BERGEN BRUNSWIG | 11,992,020 |
| 2002 | BINDLEY WESTERN INDUSTRIE | 240,060 |
| 2002 | CARDINAL HEALTH | 377,020 |
| 2002 | MCKEE MEDICAL PHCY | 3,240 |
| 2002 | MCKESSON CORPORATION | 234,000 |
| 2002 | PDI ENTERPRISES INC | 9,960 |
| 2002 | PHOENIX PHARMACY | 500 |

| Year | Sold To Customer | Pill Quantity |
|---|---|---|
| 2002 | VALLEY WHLSE DRUG CO | 228,600 |
| 2002 | WHITMIRE DC-DBA:CARD HLTH | 673,920 |
| 2002 | WHITMIRE DIST CORP | 12,360 |
| 2002 | WHITMIRE DISTRIBUTION CO | 470,120 |
| **2002 Total** | | **17,703,940** |
| 2003 | AMERISOURCEBERGEN DRUG CO | 20,703,040 |
| 2003 | BARNES WHOLESALE INC | 84,440 |
| 2003 | BINDLEY WESTERN INDUSTRIE | 37,560 |
| 2003 | CARDINAL HEALTH | 2,464,860 |
| 2003 | H D SMITH WHOLESALE DRUG | 672,320 |
| 2003 | MCKEE MEDICAL PHCY | 2,160 |
| 2003 | MCKESSON CORPORATION | 94,000 |
| 2003 | PDI ENTERPRISES INC | 26,520 |
| 2003 | VALLEY WHLSE DRUG CO | 217,440 |
| 2003 | WHITMIRE DC-DBA:CARD HLTH | 2,259,720 |
| 2003 | WHITMIRE DISTRIBUTION CO | 1,243,100 |
| **2003 Total** | | **27,805,160** |
| 2004 | ABC SACRAMENTO-NATIONAL | 963,800 |
| 2004 | ABC SACRAMENTO-STRIKER | 3,906,800 |
| 2004 | AMERISOURCEBERGEN DRUG CO | 17,670,060 |
| 2004 | CARDINAL HEALTH | 7,403,960 |
| 2004 | H D SMITH WHOLESALE DRUG | 1,314,480 |
| 2004 | PDI ENTERPRISES INC | 6,840 |
| 2004 | REBEL DISTRIBUTORS CORP | 14,400 |
| 2004 | VALLEY WHLSE DRUG CO | 331,220 |
| 2004 | WHITMIRE DC-DBA:CARD HLTH | 364,320 |
| 2004 | WHITMIRE DISTRIBUTION CO | 4,154,200 |
| **2004 Total** | | **36,130,080** |
| 2005 | ABC SACRAMENTO-STRIKER | 7,770,320 |
| 2005 | AMERISOURCEBERGEN DRUG CO | 17,672,840 |

| Year | Sold To Customer | Pill Quantity |
|---|---|---|
| 2005 | CARDINAL HEALTH | 9,770,540 |
| 2005 | H D SMITH WHOLESALE DRUG | 1,486,680 |
| 2005 | PDI ENTERPRISES INC | 6,120 |
| 2005 | REBEL DISTRIBUTORS CORP | 470,880 |
| 2005 | VALLEY WHLSE DRUG CO | 357,000 |
| 2005 | WALGREEN WRHSE | 68,760 |
| 2005 | WALGREENS - MORENO VLY | 95,760 |
| 2005 | WHITMIRE DISTRIBUTION CO | 4,906,680 |
| **2005 Total** | | **42,605,580** |
| 2006 | ABC SACRAMENTO-STRIKER | 5,230,760 |
| 2006 | AMERISOURCEBERGEN DRUG CO | 9,443,680 |
| 2006 | CARDINAL HEALTH | 11,685,340 |
| 2006 | H D SMITH WHOLESALE DRUG | 1,236,120 |
| 2006 | REBEL DISTRIBUTORS CORP | 31,320 |
| 2006 | VALLEY WHLSE DRUG CO | 182,440 |
| **2006 Total** | | **27,809,660** |
| **Grand Total** | | **196,928,680** |

**EXHIBIT C**

SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN FRANCISCO

Case No.
CGC-12-519030

PHILIP BRYAN *et al.*,

*Plaintiffs*,

v.

BRISTOL-MYERS SQUIBB COMPANY,
MCKESSON CORPORATION, and
DOES 1 to 100,

*Defendants.*

**RESPONSE OF DEFENDANT BRISTOL-MYERS SQUIBB COMPANY TO PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS**

Dept: 302
Trial Date: None
Complaint Filed: March 9, 2012

| | |
|---|---|
| PROPOUNDING PARTY: | PLAINTIFFS PHILIP BRYAN et al. |
| RESPONDING PARTY: | DEFENDANT BRISTOL-MYERS SQUIBB COMPANY |
| SET NO.: | ONE |

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Pursuant to California Code of Civil Procedure § 2031, Defendant Bristol-Myers Squibb Company ("BMS"), by and through its undersigned attorneys, hereby responds to Plaintiffs' First Set of Requests for Production of Documents and Things to Defendant Bristol-Myers Squibb Company, dated October 17, 2012.

## PRELIMINARY STATEMENT

Plaintiffs and BMS are currently engaged in negotiations regarding the response to these Requests. BMS's counsel has been, and continues to be, available to meet and confer concerning these Requests in an effort to reach agreement as to the reasonable scope of responses to these Requests. Moreover, Plaintiffs and BMS have agreed in general to coordinate discovery efforts with other plaintiffs in Plavix® litigation in other state and federal jurisdictions. BMS also is prepared to produce to Plaintiffs the documents it has produced previously to plaintiffs in certain Plavix cases pending in the United States District Court for the District of New Jersey, upon entry of an appropriate agreed-upon protective order. Although negotiations with Plaintiffs over responses to these Requests are ongoing, BMS now provides this Response to preserve its objections to these Requests.

BMS provides this Response based upon investigation conducted in the time available since service of the Requests. As of the date of this Response, BMS has not had a sufficient opportunity to review all documents, interview all personnel, or otherwise obtain all information that may prove relevant in objecting or responding to the Requests. As a consequence, this Response is based upon information now known to BMS, which BMS believes to be pertinent in objecting or responding to the Requests. BMS may later discover or acquire additional information bearing on the Requests and BMS's objections and responses thereto. Without in any way obligating itself to do so, BMS reserves the right: (a) to make subsequent revisions or amendments to its objections and this Response based upon information, evidence, documents, facts, and/or other things that hereafter may be discovered, or the relevance of which may hereafter be discovered; and (b) to produce, introduce, or rely upon additional or subsequently acquired or discovered writings, evidence, and information in any proceedings or at any trial held hereafter.

Further, any response by BMS to a particular Request is not intended, and shall not be construed, as an admission of the existence of any fact, assertion, or other matters expressed or implied in the Request. By agreeing to produce documents or information responsive to any Request, BMS does not admit that any responsive documents or information exist.

BMS incorporates this Preliminary Statement into each objection and response below as if fully set forth in its entirety.

## GENERAL OBJECTIONS

BMS makes the following General Objections to the Requests, which are expressly incorporated into each of BMS's Specific Objections and Responses as though set forth in full and without waiving these General Objections. To the extent a specific objection is cited in response to a request, that specific objection is provided because it is believed to be particularly applicable to the specific request and is not construed as a waiver of any of these General Objections.

1. BMS objects that the Requests seek information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, and/or other privileges, immunities, and legal protections against disclosure. Nothing contained herein is intended to be, nor shall in any way be construed as, waiving any attorney-client privilege, work product doctrine, right to privacy, or any other applicable privilege, doctrine, law, immunity, or rule protecting information from disclosure. To the extent BMS discloses privileged information in response to the Requests, such disclosure or production is not intended to waive any privilege, right to privacy, or other applicable protection. In the event that privileged or otherwise protected information is disclosed by BMS, such disclosure shall be deemed inadvertent and shall not constitute a waiver of BMS's right to assert the applicability of any privilege for such information. If such disclosure occurs in the context of document production, BMS reserves the right to demand the return of any such documents and all copies thereof.

2. BMS objects that the Requests seek documents that are non-public, confidential, and/or competitively sensitive, and which contain proprietary and confidential business and financial information, including information constituting or pertaining to trade secrets, personnel information and/or other competitively sensitive research, development, or other commercial information. Disclosure of such information would be harmful to BMS's legitimate business interests. BMS accordingly objects to producing any documents until the entry of a protective order satisfactory to BMS that protects BMS's proprietary, confidential, and trade secret information.

3. BMS objects that the Requests are overly broad and unduly burdensome, and purport to require BMS to ascertain the documents, however limited or tangential, of each and every individual employed by BMS at every level of authority or responsibility, relating to the subject matter of these Requests.

4. BMS objects to the Requests on the grounds that they are overly broad, unduly burdensome, oppressive, compound, not properly limited in temporal or geographic scope, and seek information that is neither relevant to the subject matter of this litigation nor reasonably calculated to lead to the discovery of admissible evidence, including to the extent they request information beyond the scope of each Plaintiff's specific claims and allegations.

5. BMS objects to the Requests as overbroad, unduly burdensome, and calling for the production of cumulative and duplicative information to the extent they call for "all" documents or communications related to a given subject.

6. BMS objects to the Requests that seek information that is available through less burdensome means of discovery or other sources in that the information requested is: (a) in the possession, custody, or control of Plaintiffs; (b) in the possession, custody, or control of other parties or non-parties; and/or (c) publicly available or otherwise equally available to Plaintiffs. BMS will produce documents only to the extent that such documents are in the possession, custody, or control of BMS.

7. BMS objects that the Requests purport to impose requirements, burdens, and/or discovery obligations that exceed those imposed by the California Code of Civil Procedure.

8. BMS objects to the Requests to the extent they seek electronically stored information or media from sources that are not reasonably accessible because of undue burden or cost.

9. BMS objects to the Interrogatories to the extent they seek discovery or private or personal information related to patients and/or users of any pharmaceutical products, participants in clinical trials, reporters of adverse events, personnel files, or other personal information that is protected. *See* 21 U.S.C. § 360(i)(b)(3); 21 C.F.R. § 20.63; Cal. Const. Art. I, § 1; Cal. Civ. Code §§ 56 *et seq.* Information that identifies patients and physicians or any other information protected by law will be redacted from any documents produced.

10. BMS objects to the Requests as overbroad, unduly burdensome, seeking irrelevant information, and not reasonably calculated to lead to the discovery of admissible evidence to the extent they seek discovery that is not properly limited in temporal

scope. BMS further objects to the Requests as unduly burdensome to the extent they purport to require repetitive, multiple, or continuing document collection efforts.

11. BMS's objection to or failure to object to any particular Request is not, and shall not be construed, as an admission that responsive information exists.

12. Where Requests are duplicative of other discovery requests propounded by Plaintiffs, BMS will meet and confer with Plaintiffs about what, if anything, to produce in response to overlapping discovery requests but objects to requests calling for duplicative productions of the same information and/or documents.

13. BMS's agreement, if any, to produce documents pursuant to these Requests, notwithstanding the objectionable nature of any specific document request, definition, or instruction, shall not be construed as: (a) a stipulation that any document is relevant to any proceeding; (b) a waiver of any general or specific objections asserted herein; or (c) an agreement that future requests for similar documents or information will be treated in a similar manner. BMS specifically reserves all rights to object to the use of any documents or information in any proceeding, including but not limited to this action.

14. These Responses are made solely for the purpose of this action. Agreement by BMS to produce information subject to its objections does not constitute an admission that such material is properly discoverable in this or any other actions. Further, by responding to these document requests, BMS does not waive any objection that may be applicable to:

(a) the use, for any purpose, by Plaintiffs of any information in response to these document requests; or (b) the admissibility, privilege, relevance, authenticity, or materiality of any of the information to any issues in the case. BMS expressly reserves the right to object to the use of documents or things produced in connection herewith during any subsequent proceedings, including trial of this action or any other actions.

## OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

BMS sets forth below objections to Plaintiffs' instructions and definitions for the reasons stated, which objections are applicable to each of BMS's Specific Objections and Responses to the Requests, and are incorporated therein.

A. "YOU," "YOUR" and "BMS" means Defendant BRISTOL-MYERS SQUIBB COMPANY (hereinafter "BMS") or any person acting on its behalf, including but not limited to, employees, representatives or agents, accountants, attorneys, or consultants.

**Objection:** BMS objects to Definition and Instruction A on the grounds that it renders each of the Requests in which it is used overly broad and unduly burdensome. BMS further objects that Definition and Instruction A renders each of the Requests in which it is used beyond the scope of permissible discovery under the California Code of Civil Procedure, as it calls for or may be construed as calling for documents in the possession, custody or control of any former employee, agent, representative, accountant, attorney, consultant, or other persons acting on BMS's behalf. BMS further objects that Definition and Instruction A seeks information that is subject

to attorney-client privilege in that it seeks documents in the control or possession of BMS's "employees, representatives or agents, accountants, attorneys, consultants." Subject to and without waiving any objections, BMS will interpret "you" or "your" to mean BMS and its current officers and employees.

B. "PLAVIX" refers to the brand name of clopidogrel bisulfate.

**Objection:** No particular objection.

C. The terms "REFER(RING)," "RELATE(D)," "RELATED TO," and "CONCERNING" are used in their broadest and most inclusive sense and mean and include the terms relate to, refer to, constitute, memorialize, summarize, discuss, describe, mention, reflect, contain, concern, embody, identify, evidence, state, deal with, comment on, respond to, set forth, pertain to, analyze, support, contradict, or is logically or factually connected with that subject or thing.

**Objection:** BMS objects to Definition and Instruction C on the grounds that it renders each of the Requests in which it is used overly broad and unduly burdensome, and vague and ambiguous.

D. "DOCUMENT(S)," "DOCUMENTATION" or any similar term as used in these requests shall have the broadest possible meaning. Consistent with the above definition, the term document(s) shall include, without limitation, any written, printed, typed, photostatic, photographed, recorded, computer-generated, computer-stored, or otherwise maintained or reproduced communication or representation, any data compilation in any form, whether comprised of letters, words, numbers, pictures, sounds, bytes, emails, spreadsheets, electronic signals or impulses, electronic data, active files, deleted files, file frag-

ments, or any combination thereof including, without limitation, all memoranda, notes, records, letters, envelopes, telegrams, messages, studies, analyses, contracts, agreements, projections, estimates, working papers, accounts, analytical records, reports and/or summaries of investigations, opinions or reports of consultants, opinions or reports of experts, opinions or reports of accountants, other reports, trade letters, press releases, comparisons, books, diaries, articles, magazines, newspapers, booklets, brochures, pamphlets, circulars, bulletins, notices, forecasts, drawings, diagrams, instructions, minutes of meetings or communications of any type, including inter- and intra-office communications, questionnaires, surveys, charts, graphs, photographs, phonographs, films, tapes discs, data cells, drums, printouts, all other compiled data which can be obtained (translated, if necessary, through intermediary or other devices into usable forms), documents maintained on, stored in or generated on any electronic transfer or storage system, any preliminary versions, drafts or revisions of any of the foregoing, and other writings or documents of whatever description or kind, whether produced or authorized by or on behalf of YOU or anyone else, and shall include all non-identical copies and drafts of any of the foregoing now in t e possession, custody or control of YOU, or the former or present directors, officers, counsel, agents, employees, partners, consultants, principals, and/or PERSONS acting on YOUR behalf.

**Objection:** BMS objects to Definition and Instruction D on the grounds that it renders each of the Requests in which it is used overly broad and unduly burdensome, and vague and ambiguous. BMS further objects to Definition D on the grounds that it is

broader than the definition of "document" set forth in California Code of Civil Procedure § 2016.020 and California Evidence Code § 250. BMS further objects that Definition and Instruction D renders each of the Requests in which it is used beyond the scope of permissible discovery under the California Code of Civil Procedure. Subject to and without waiving any objection, BMS will interpret the term "DOCUMENT" consistent with the definition of that term in California Code of Civil Procedure § 2016.020 and California Evidence Code § 250. To the extent documents are produced, BMS will produce electronic or other copies of documents in a faun that is reasonably accessible without undue burden or cost. The protocol for production of electronic and other documents is the subject of ongoing discussions between BMS and counsel for plaintiffs in related cases pending in other jurisdictions with whom Plaintiffs here have agreed to coordinate. BMS generally will not produce the original of any document, but where Plaintiffs believe such inspection is necessary, BMS will meet and confer regarding the inspection of originals. To the extent theses Responses indicate that BMS will produce responsive documents, BMS may alternatively make such materials available for inspection and copying.

E. The term "produce all DOCUMENTS" means that all responsive DOCUMENTS shall be produced in the format of the application in which the DOCUMENT was created ("NATIVE FORMAT"), and shall include all META-DATA. META-DATA includes but is not limited to (i) information embedded in the DOCUMENT that is not ordinarily viewable or printable from the application that generated, edited, or modified the DOCUMENT; and

(ii) information generated automatically by the operation of a computer or other information technology system when a DOCUMENT is created, modified, transmitted, deleted or otherwise manipulated by a user of such system.

**Objection:** BMS objects to Definition and Instruction E on the grounds that it renders each of the Requests in which it is used overly broad and unduly burdensome, and vague and ambiguous. BMS further objects to Definition E on the grounds that it is broader than the definition of "document" set forth in California Code of Civil Procedure § 2016.020 and California Evidence Code § 250. BMS further objects that Definition and Instruction E renders each of the Requests in which it is used beyond the scope of permissible discovery under the California Code of Civil Procedure. Subject to and without waiving any objection, BMS will interpret the term "DOCUMENT" consistent with the definition of that tern" in California Code of Civil Procedure § 2016.020 and California Evidence Code § 250. BMS is negotiating with representatives of plaintiffs in other jurisdictions about the format for production of electronic and other documents, with whom Plaintiffs here have agreed to coordinate.

F. The term "ANY" includes each, every, and all PERSONS, places, or things to which the terra refers.

**Objection:** No particular objection.

G. The terms "AND" and "OR" are to be construed either conjunctively or disjunctively to bring within the scope of these requests any information that might otherwise be considered to be beyond their scope.

**Objection:** BMS objects to Definition and Instruction G on the grounds that it renders each of the Requests in which it is used overly broad and unduly burdensome, and vague and ambiguous, as it seeks to "bring within the scope of these requests any information that might otherwise be considered to be beyond their scope."

H. The terms "IDENTIFY" or "IDENTITY":

a. When used in reference to a natural PERSON, mean to state the individual's full name, his or her present business and home ADDRESS (or, if unknown, the last known business and home ADDRESS), and his or her positions, business affiliations, and ADDRESSES at all times relevant to the request in question.

b. When used in reference to a PERSON other than a natural PERSON, mean to state its full name, the ADDRESS of its principal place of business, the nature of the entity, if known (e.g., type of government agency), and the principal PERSONS involved with the entity at all times relevant to the request in question.

**Objection:** BMS objects to Definition and Instruction H and its subparts on the grounds that it renders each of the Requests in which it is used overly broad and unduly burdensome, and vague and ambiguous.

I. The term "PERSON(S)" means any natural person or any firm, corporation, association, partnership, or other form of legal entity.

**Objection:** BMS objects to Definition and Instruction I on the grounds that it renders each of the Re-

quests in which it is used overly broad and unduly burdensome, and vague and ambiguous.

J. The term "ADDRESS" means complete street address (including mailbox number, if applicable), city, state and zip code. If a PERSON has a-P.O. Box address but not a street address, only then does ADDRESS mean complete P.O. Box address.

**Objection:** BMS objects to Definition and Instruction J on the grounds that it renders each of the Requests in which it is used overly broad and unduly burdensome, and vague and ambiguous.

K. The singular form of a word should be interpreted as plural, and the plural form of a word should be interpreted as singular, to bring within the scope of this request any information that might otherwise be considered to be beyond their scope.

**Objection:** BMS objects to Definition and Instruction K on the grounds that it renders each of the Requests in which it is used overly broad and unduly burdensome, and vague and ambiguous, as it seeks to "bring within the scope of this request any information that might otherwise be considered to be beyond their scope."

L. These requests are continuing in nature. If further information or documents come into YOUR possession or are brought to YOUR attention, or the attention of YOUR agents, employees, officers, directors, representatives or attorneys in the course of trial or prior to trial, then supplementation of YOUR responses is required.

**Objection:** BMS objects to Definition and Instruction L on the grounds that it renders each of the Requests in which it is used overly broad and unduly

burdensome, and vague and ambiguous. BMS further objects that Definition and Instruction L renders each of the Requests in which it is used beyond the scope of permissible discovery under the California Code of Civil Procedure, as it calls for or may be construed as calling for documents in the possession, custody or control of any former employee, agent, representative, accountant, attorney, consultant, or other persons acting on BMS's behalf. BMS further objects that Definition and Instruction L seeks information that is subject to attorney-client privilege in that it seeks documents in the control or possession of BMS's "employees, representatives or agents, accountants, attorneys, consultants." Subject to and without waiving any objections, BMS will interpret "you" or "your" to mean BMS and its officers and employees.

**SPECIFIC OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS**

REQUEST FOR PRODUCTION NO. 1:

Please produce all DOCUMENTS that REFER OR RELATE to Defendant BMS's DOCUMENT retention policy OR policies, AND each of them, between 1997 AND the present, including the manner in which DOCUMENTS are stored, the length of time they are stored, AND how they are backed-up AND archived.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Request. BMS objects that this Request is overly broad, especially, but not exclusively, in that it seeks documents from 1997 to the present. BMS further objects that this Request is unduly bur-

densome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Request is confusing in its use of the terms "each of them." BMS further objects that this Request is vague and ambiguous, especially, but not exclusively, in its use of the term "manner." BMS further objects to the extent this Request is duplicative and cumulative of Plaintiffs' Notice of. Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 2, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Request. BMS further objects to the extent this Request is duplicative and cumulative of Plaintiffs' First Set of Special Interrogatories to Defendant Bristol-Myers Squibb Company No. 7, and hereby incorporates by reference each General Objection and Objection to Instructions and Definitions in BMS's Response to Plaintiffs' First Set of Special Interrogatories into BMS's Specific Objections to this Request. BMS further objects to the extent this Request seeks information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, joint defense privilege and/or common interest doctrine, as well as any other applicable privilege, protection and immunity against disclosure.

REQUEST FOR PRODUCTION NO. 2:

Please produce all DOCUMENTS that REFER OR RELATE to ANY location in which Defendant BMS

maintained/maintains OR stored/stores DOCUMENTS RELATED in ANY manner to PLAVIX.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Request. BMS objects that this Request is overly broad, especially, but not exclusively, in that it seeks documents with no temporal limit. BMS further objects that this Request is and unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Request is vague and ambiguous, especially, but not exclusively, in its use of the term "maintained/maintains." BMS further objects to the extent this Request is duplicative and cumulative of Plaintiffs' First Set of Special Interrogatories to Defendant Bristol-Myers Squibb Company No. 8, and hereby incorporates by reference each General Objection and Objection to Instructions and Definitions in BMS's Response to Plaintiffs' First Set of Special Interrogatories into BMS's Specific Objections to this Request.

REQUEST FOR PRODUCTION NO. 3:

Please produce all DOCUMENTS that REFER OR RELATE to each current and each fanner custodian of DOCUMENTS that RELATE to PLAVIX, including his/her name, address, job title, and job description, and the dates he/she was/is employed in that capacity.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objec-

tions to this Request. BMS objects that this Request is overly broad, especially, but not exclusively, in that it seeks documents with no temporal limit. BMS further objects that this Request is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Request is vague and ambiguous, especially, but not exclusively, in its use of the term "custodian." BMS further objects to the extent this Request is duplicative and cumulative of Plaintiffs' First Set of Special Interrogatories to Defendant Bristol-Myers Squibb Company No. 9, and hereby incorporates by reference each General Objection and Objection to Instructions and Definitions in BMS's Response to Plaintiffs' First Set of Special Interrogatories into BMS's Specific Objections to this Request.

REQUEST FOR PRODUCTION NO. 4:

Please produce all DOCUMENTS that REFER OR RELATE to ANY distributors, wholesalers, OR third-party entities that transported, shipped, OR otherwise placed into the stream of commerce any form of PLAVIX in the State of California at any time between 1997 and the present.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Request. BMS objects that this Request is overly broad, especially, but not exclusively, in that it seeks documents from 1997 to the present. BMS further objects that this Request is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not rea-

sonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Request calls for or may be construed as calling for documents in the possession, custody, or control of a legal entity other than BMS. BMS further objects that this Request is vague and ambiguous, especially, but not exclusively, in its use of the terms "distributors," "wholesalers," "third-party entities," and "otherwise placed into the stream of commerce." BMS further objects to the extent this Request is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter Nos. 6 and 7, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Request. BMS further objects to the extent this Request is duplicative and cumulative of Plaintiffs' First Set of Special Interrogatories to Defendant Bristol-Myers Squibb Company No. 10, and hereby incorporates by reference each General Objection and Objection to Instructions and Definitions in BMS's Response to Plaintiffs' First Set of Special Interrogatories into BMS's Specific Objections to this Request.

REQUEST FOR PRODUCTION NO. 5:

Please produce all DOCUMENTS that REFER OR RELATE to ANY corporate organizational charts or other DOCUMENT which depict the structure OR identity, year by year, of employees of BMS OR agents of BMS OR departments within BMS involved in OR responsible for ANY of the following: animal studies, clinical trials, pharmacovigilance,

safety surveillance OR safety monitoring, epidemiology studies, medical affairs, pregnancy registry, labeling, evaluation OR analysis of risk factors, regulatory affairs, sales AND marketing OR promotion of PLAVIX at ANY and all times between 1997 AND the present.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Request. BMS objects that this Request is overly broad, especially, but not exclusively, in that it seeks documents from 1997 to the present. BMS further objects that this Request is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence.

Dated: November 20, 2012

ARNOLD & PORTER LLP

By: */s/*

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*Attorneys for Bristol-Myers Squibb Company*

**PROOF OF SERVICE**

STATE OF CALIFORNIA )
) ss
COUNTY OF San Francisco )

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111.

On November 20, 2012, I served the foregoing document described as follows:

**RESPONSE OF DEFENDANT BRISTOL-MYERS SQUIBB COMPANY TO PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS**

on the interested parties by placing a true and correct copy thereof in a sealed envelope(s) addressed as follows:

Hunter J. Shkolnik
Kelly A. McMeekin
NAPOLI BERN RIPKA SHKOLNIK & ASSOCIATES LLP
525 S. Douglas Street, Suite 260
El Segundo, CA 90245
*Attorneys for Plaintiffs*

McKESSON CORPORATION
The Prentice Hall Corporation Systems, Inc.
2730 Gateway Oaks Dr., Suite 100
Sacramento, CA 95833
*Defendant*

William M. Audet
Joshua C. Ezrin
AUDET & PARTNERS LLP
221 Main Street, Suite 1460
San Francisco, CA 9410
*Attorneys for Plaintiffs*

☐ **BY MAIL** I placed such envelope with postage thereon prepaid in the United States Mail at Three Embarcadero Center, 7th Floor, San Francisco, California 94111. Executed on at San Francisco, California.

☐ **BY PERSONAL SERVICE** I caused such envelope to be delivered by hand to the office of the addressee. Executed on at San Francisco, California.

☐ **BY FACSIMILE** The above-referenced document (together with all exhibits and attachments thereto) was transmitted via Facsimile transmission to the addressee(s) as indicated on the attached mailing list on the date thereof. The transmission was reported as completed and without error. Executed on at San Francisco, California.

☒ **BY FEDERAL EXPRESS** I am readily familiar with Arnold & Porter LLP's business practices of collecting and processing items for pickup and next business day delivery by Federal Express. Under said practices, items to be delivered the next business day are either picked up by Federal Express or deposited in a box or other Facility regularly maintained by Federal Express in the ordinary course of business on that same day with the cost thereof billed to Arnold & Porter LLP's account. I placed such sealed envelope for delivery by Federal Express

to the offices of the addressee(s) as indicated on the attached mailing list on the date hereof following ordinary business practices. Executed on November 20, 2012 at San Francisco, California.

☒ **STATE** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

☐ **(VIA EMAIL)** by transmitting a true and correct copy via email the document(s) listed above on this date before 5:00 p.m. PST to the person(s) at the email address(es) set forth below.

*/s/* Jeremy M. McLaughlin
Jeremy M. McLaughlin

SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SAN FRANCISCO

---

Case No.
CGC-12-519030

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PHILIP BRYAN *et al.*,

*Plaintiffs*,

v.

BRISTOL-MYERS SQUIBB COMPANY,
MCKESSON CORPORATION, and
DOES 1 to 100,

*Defendants.*

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**RESPONSE OF DEFENDANT BRISTOL-MYERS SQUIBB COMPANY TO PLAINTIFFS' FIRST SET OF SPECIAL INTERROGATORIES**

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Dept: 302
Trial Date: None
Complaint Filed: March 9, 2012

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| | |
|---|---|
| PROPOUNDING PARTY: | PLAINTIFFS PHILIP BRYAN et al. |
| RESPONDING PARTY: | DEFENDANT BRISTOL-MYERS SQUIBB COMPANY |
| SET NO.: | ONE |

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Pursuant to California Code of Civil Procedure § 2030, Defendant Bristol-Myers Squibb Company

("BMS"), by and through its undersigned attorneys, hereby responds to Plaintiffs' First Set of Special Interrogatories to Defendant Bristol-Myers Squibb Company, dated October 17, 2012.

## PRELIMINARY STATEMENT

Plaintiffs and BMS are currently engaged in negotiations regarding the response to these Interrogatories. BMS's counsel has been, and continues to be, available to meet and confer concerning these Interrogatories in an effort to reach agreement as to the reasonable scope of responses to these Interrogatories. Moreover, Plaintiffs and BMS have agreed in general to coordinate discovery efforts with other plaintiffs in Plavix® litigation in other state and federal jurisdictions. Although negotiations with Plaintiffs over responses to these Interrogatories are ongoing, BMS provides this Response to preserve its objections to these Interrogatories.

BMS provides this Response based upon investigation conducted in the time available since service of the Interrogatories. As of the date of this Response, BMS has not had a sufficient opportunity to review all documents, interview all personnel, or otherwise obtain all information that may prove relevant in objecting or responding to the Interrogatories. As a consequence, this Response is based upon information now known to BMS, which BMS believes to be pertinent in objecting or responding to the Interrogatories. BMS may later discover or acquire additional information bearing on the Interrogatories and BMS's objections and responses thereto. Without in any way obligating itself to do so, BMS reserves the right: (a) to make subsequent revisions or amendments to its objections and this Response based upon

information, evidence, documents, facts, and/or other things that hereafter may be discovered, or the relevance of which may hereafter be discovered; and (b) to produce, introduce, or rely upon additional or subsequently acquired or discovered writings, evidence, and information in any proceedings or at any trial held hereafter.

Further, any response by BMS to a particular Interrogatory is not intended, and shall not be construed, as an admission of the existence of any fact, assertion, or other matters expressed or implied in the Interrogatory. By agreeing to produce documents or information responsive to any

Interrogatory, BMS does not admit that any responsive documents or information exist.

BMS incorporates this Preliminary Statement into each objection and response below as if fully set forth in its entirety.

## GENERAL OBJECTIONS

BMS makes the following General Objections to the Interrogatories, which are expressly incorporated into each of BMS's Specific Objections and Responses as though set forth in full and without waiving these General Objections. To the extent a specific objection is cited in response to an interrogatory, that specific objection is provided because it is believed to be particularly applicable to the specific interrogatory and is not construed as a waiver of any of these General Objections.

1. BMS objects that the Interrogatories seek information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, and/or other privileges, immunities, and legal protec-

tions against disclosure. Nothing contained herein is intended to be, nor shall in any way be construed as, waiving any attorney-client privilege, work product doctrine, right to privacy, or any other applicable privilege, doctrine, law, immunity, or rule protecting information from disclosure. To the extent BMS discloses privileged information in response to the Interrogatories, such disclosure or production is not intended to waive any privilege, right to privacy, or other applicable protection. In the event that privileged or otherwise protected information is disclosed by BMS, such disclosure shall be deemed inadvertent and shall not constitute a waiver of BMS's right to assert the applicability of any privilege for such information. If such disclosure occurs in the context of document production, BMS reserves the right to demand the return of any such documents and all copies thereof.

2. BMS objects that the Interrogatories seek information that is non-public, confidential, and/or competitively sensitive, and which contains proprietary and confidential business and financial information, including information constituting or pertaining to trade secrets, personnel information and/or other competitively sensitive research, development, or other commercial information. Disclosure of such information would be harmful to BMS's legitimate business interests. BMS accordingly objects to producing any information or documents until the entry of a protective order satisfactory to BMS that protects BMS's proprietary, confidential, and trade secret information.

3. BMS objects that the Interrogatories are overly broad and unduly burdensome, and purport to re-

quire BMS to ascertain the documents, however limited or tangential, of each and every individual employed by BMS at every level of authority or responsibility, relating to the subject matter of these Interrogatories.

4. BMS objects to the Interrogatories on the grounds that they are overly broad, unduly burdensome, oppressive, compound, not properly limited in temporal or geographic scope, and seek information that is neither relevant to the subject matter of this litigation nor reasonably calculated to lead to the discovery of admissible evidence, including to the extent they request information beyond the scope of each Plaintiff's specific claims and allegations.

5. BMS objects to the Interrogatories as overbroad, unduly burdensome, and calling for the production of cumulative and duplicative information to the extent they call for "all" information, documents, or communications related to a given subject.

6. BMS objects to the Interrogatories that seek information that is available through less burdensome means of discovery or other sources in that the information requested is: (a) in the possession, custody, or control of Plaintiffs; (b) in the possession, custody, or control of other parties or non-parties; and/or (c) publicly available or otherwise equally available to Plaintiffs. BMS will produce information only to the extent that such information is in the possession, custody, or control of BMS.

7. BMS objects to the Interrogatories to the extent they seek electronically stored information or media from sources that are not reasonably accessible because of undue burden or cost.

8. BMS objects to the Interrogatories to the extent they seek discovery or private or personal information related to patients and/or users of any pharmaceutical products, participants in clinical trials, reporters of adverse events, personnel files, or other personal information that is protected. *See* 21 U.S.C. § 360(i)(b)(3); 21 C.F.R. § 20.63; Cal. Const. Art. I, § 1; Cal. Civ. Code §§ 56 *et seq.* Information that identifies patients and physicians or any other information protected by law will be redacted from any documents produced.

9. BMS objects to the Interrogatories as overbroad, unduly burdensome, seeking irrelevant information, and not reasonably calculated to lead to the discovery of admissible evidence to the extent they seek discovery that is not limited in temporal scope. BMS further objects to the Interrogatories as unduly burdensome to the extent they purport to require repetitive, multiple, or continuing information collection efforts.

10. BMS objects that the Interrogatories contain "Definitions" in violation of California Code of Civil Procedure § 2030.060(d), which requires that "[e]ach interrogatory shall be full and complete in and of itself' and may not include any "preface or instruction."

11. BMS objects that the Interrogatories purport to impose requirements, burdens, and/or discovery obligations that exceed those imposed by the California Code of Civil Procedure.

12. BMS's objection to or failure to object to any particular Interrogatory is not, and shall not be construed, as an admission that responsive information exists.

13. Where Interrogatories are duplicative of other discovery requests propounded by Plaintiffs, BMS will meet and confer with Plaintiffs about what, if anything, to produce in response to overlapping discovery requests but objects to requests calling for duplicative productions of the same information and/or documents.

14. BMS's agreement, if any, to respond to an Interrogatory, notwithstanding the objectionable nature of any specific Interrogatory, definition, or instruction, shall not be construed as: (a) a stipulation that any information is relevant to any proceeding; (b) a waiver of any general or specific objections asserted herein; or (c) an agreement that future interrogatories requesting similar information will be treated in a similar manner. BMS specifically reserves all rights to object to the use of any documents or information in any proceeding, including but not limited to this action.

15. These Responses are made solely for the purpose of this action. Agreement by BMS to produce information subject to its objections does not constitute an admission that such material is properly discoverable in this or any other action. Further, by responding to these interrogatories, BMS does not waive any objection that may be applicable to: (a) the use, for any purpose, by Plaintiffs of any information, documents or things given in response to these interrogatories; or (b) the admissibility, privilege, relevance, authenticity, or materiality of any of the information, documents or things to any issues in the case. BMS expressly reserves the right to object to the use of information, documents or things produced in connection herewith during any subsequent

proceedings, including trial of this action or any other actions.

## OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

BMS sets forth below objections to Plaintiffs' instructions and definitions for the reasons stated, which objections are applicable to each of BMS's Specific Objections and Responses to the Interrogatories, and are incorporated therein.

A. "YOU," "YOUR" and "BMS" means Defendant BRISTOL-MYERS SQUIBB COMPANY (hereinafter "BMS") or any person acting on its behalf, including but not limited to, employees, representatives or agents, accountants, attorneys, or consultants.

**Objection:** BMS objects to Definition and Instruction A on the grounds that it renders each of the Interrogatories in which it is used overly broad and unduly burdensome. BMS further objects that Definition and Instruction A renders each of the Interrogatories in which it is used beyond the scope of permissible discovery under the California Code of Civil Procedure, as it calls for or may be construed as calling for information and/or documents in the possession, custody or control of any former employee, agent, representative, accountant, attorney, consultant, or other persons acting on BMS's behalf. BMS further objects that Definition and Instruction A seeks information that is subject to attorney-client privilege in that it seeks information and/or documents in the control or possession of BMS's "employees, representatives or agents, accountants, attorneys, consultants." Subject to and without waiving any objections, BMS will interpret "you" or "your" to mean BMS and its current officers and employees.

B. "PLAVIX" refers to the brand name of clopidogrel bisulfate.

**Objection:** No particular objection.

C. The terms "REFER(RING)," "RELATE(D)," "RELATED TO," and "CONCERNING" are used in their broadest and most inclusive sense and mean and include the terms relate to, refer to, constitute, memorialize, summarize, discuss, describe, mention, reflect, contain, concern, embody, identify, evidence, state, deal with, comment on, respond to, set forth, pertain to, analyze, support, contradict, or is logically or factually connected with that subject or thing.

**Objection:** BMS objects to Definition and Instruction C on the grounds that it renders each of the Interrogatories in which it is used overly broad and unduly burdensome, and vague and ambiguous.

D. "DOCUMENT(S)," "DOCUMENTATION" or any similar term as used in these interrogatories shall have the broadest possible meaning. Consistent with the above definition, the term document(s) shall include, without limitation, any written, printed, typed, photostatic, photographed, recorded, computer-generated, computer-stored, or otherwise maintained or reproduced communication or representation, any data compilation in any form, whether comprised of letters, words, numbers, pictures, sounds, bytes, emails, spreadsheets, electronic signals or impulses, electronic data, active files, deleted files, file fragments, or any combination thereof including, without limitation, all memoranda, notes, records, letters, envelopes, telegrams, messages, studies, analyses, contracts, agreements, projections, estimates, working papers, accounts, analytical records, reports and/or summaries of investigations,

opinions or reports of consultants, opinions or reports of experts, opinions or reports of accountants, other reports, trade letters, press releases, comparisons, books, diaries, articles, magazines, newspapers, booklets, brochures, pamphlets, circulars, bulletins, notices, forecasts, drawings, diagrams, instructions, minutes of meetings or communications of any type, including inter- and intra-office communications, questionnaires, surveys, charts, graphs, photographs, phonographs, films, tapes discs, data cells, drums, printouts, all other compiled data which can be obtained (translated, if necessary, through intermediary or other devices into usable forms), documents maintained on, stored in or generated on any electronic transfer or storage system, any preliminary versions, drafts or revisions of any of the foregoing, and other writings or documents of whatever description or kind, whether produced or authorized by or on behalf of YOU or anyone else, and shall include all non-identical copies and drafts of any of the foregoing now in the possession, custody or control of YOU, or the former or present directors, officers, counsel, agents, employees, partners, consultants, principals, and/or PERSONS acting on YOUR behalf.

**Objection:** BMS objects to Definition and Instruction D on the grounds that it renders each of the Interrogatories in which it is used overly broad and unduly burdensome, and vague and ambiguous. BMS further objects to Definition D on the grounds that it is broader than the definition of "document" set forth in California Code of Civil Procedure § 2016.020 and California Evidence Code § 250. BMS further objects that Definition and Instruction D renders each of the Interrogatories in which it is used beyond the scope of permissible discovery un-

der the California Code of Civil Procedure. Subject to and without waiving any objection, BMS will interpret the term "DOCUMENT" consistent with the definition of that term in California Code of Civil Procedure § 2016.020 and California Evidence Code § 250. To the extent documents are produced, BMS will produce electronic or other copies of documents in a form that is reasonably accessible without undue burden or cost. The protocol for production of electronic and other documents is the subject of ongoing discussions between BMS and counsel for plaintiffs in related cases pending in other jurisdictions with whom Plaintiffs here have agreed to coordinate. BMS generally will not produce the original of any document, but where Plaintiffs believe such inspection is necessary, BMS will meet and confer regarding the inspection of originals. To the extent theses Responses indicate that BMS will produce responsive documents, BMS may a tentatively make such materials available for inspection and copying.

E. The term "ANY" includes each, every, and all PERSONS, places, or things to which the term refers.

**Objection:** No particular objection.

F. The terms "AND" and "OR" are to be construed either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be considered to be beyond their scope.

**Objection:** BMS objects to Definition and Instruction F on the grounds that it renders each of the Interrogatories in which it is used overly broad and unduly burdensome, and vague and ambiguous, as it seeks to "bring within the scope of this request any

information that might otherwise be considered to be beyond their scope."

G. The terms "IDENTIFY" or "IDENTITY":

a. When used in reference to a natural PERSON, mean to state the individual's full name, his or her present business and home ADDRESS (or, if unknown, the last known business and home ADDRESS), and his or her positions, business affiliations, and ADDRESSES at all times relevant to the interrogatory in question.

b. When used in reference to a PERSON other than a natural PERSON, mean to state its full name, the ADDRESS of its principal place of business, the nature of the entity, if known (e.g., type of government agency), and the principal PERSONS involved with the entity at all times relevant to the Request in question.

**Objection:** BMS objects to Definition and Instruction G and its subparts on the grounds that it renders each of the Interrogatories in which it is used overly broad and unduly burdensome. BMS further objects that the definition renders each of the Interrogatories in which it is used vague and ambiguous, especially but not exclusively, in that the definition only applies to "PERSONS" but the tern is used in multiple interrogatories that do not relate to "PERSONS."

H. The term "PERSON(S)" means any natural person or any firm, corporation, association, partnership, or other form of legal entity.

**Objection:** BMS objects to Definition and Instruction H on the grounds that it renders each of the In-

terrogatories in which it is used overly broad and unduly burdensome, and vague and ambiguous.

I. The term "ADDRESS" means complete street address (including mailbox number, if applicable), city, state and zip code. If a PERSON has a P.O. Box address but not a street address, only then does ADDRESS mean complete P.O. Box address.

**Objection:** BMS objects to Definition and Instruction I on the grounds that it renders each of the Interrogatories in which it is used overly broad and unduly burdensome, and vague and ambiguous.

J. The singular form of a word should be interpreted as plural, and the plural form of a word should be interpreted as singular, to bring within the scope of this request any information that might otherwise be considered to be beyond their scope.

**Objection:** BMS objects to Definition and Instruction J on the grounds that it renders each of the Interrogatories in which it is used overly broad and unduly burdensome, and vague and ambiguous, as it seeks to "bring within the scope of this request any information that might otherwise be considered to be beyond their scope."

K. These interrogatories are continuing in nature. If further information or documents come into YOUR possession or are brought to YOUR attention, or the attention of YOUR agents, employees, officers, directors, representatives or attorneys in the course of trial or prior to trial, then supplementation of YOUR responses is required.

**Objection:** BMS objects to Definition and Instruction K on the grounds that it renders each of the Interrogatories in which it is used beyond the scope of

California Code of Civil Procedure § 2030.060(g), as it calls for a continuing obligation to supplement responses. BMS further objects to Definition and Instruction K on the grounds that it renders each of the Interrogatories in which it is used overly broad and unduly burdensome, and vague and ambiguous. BMS further objects that Definition and Instruction K renders each of the Interrogatories in which it is used beyond the scope of permissible discovery under the California Code of Civil Procedure, as it calls for or may be construed as calling for information in the possession, custody, or control of any former employee, agent, representative, accountant, attorney, consultant, or other persons acting on BMS's behalf. BMS further objects that Definition and Instruction K seeks information that is subject to attorney-client privilege in that it seeks information in the control or possession of BMS's "employees, representatives or agents, accountants, attorneys, consultants." Subject to and without waiving any objections, BMS will interpret "you" or "your" to mean BMS and its officers and employees.

**SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES**

SPECIAL INTERROGATORY NO. 1:

Please IDENTIFY all civil, bankruptcy, criminal, administrative OR ANY other lawsuits, claims OR arbitrations without any limitation, in which Defendant BMS is OR was a party or witness in ANY forum in the State of California from 1997 to the present.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objec-

tions to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects to the extent this Interrogatory requests publicly available information.

SPECIAL INTERROGATORY NO. 2:

Please IDENTIFY all offices, facilities, commercial, residential OR other properties owned, leased, rented OR otherwise occupied, utilized OR maintained currently OR in the past by Defendant BMS for ANY purpose in the State of California from 1997 to the present, and the purpose for which each such facility is used or was used.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the terms "facilities," "commercial," and "residential OR other properties owned, leased, rented OR otherwise occupied, utilized OR maintained." BMS further objects to the

extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 3, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 3:

Please IDENTIFY each PLAVIX personal injury action pending outside of the state of New Jersey in state court in which YOU have **not** sought to dismiss or transfer the action on *forum non conveniens* grounds, including the case name, case number, and the court in which the case is pending.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS further objects that this Interrogatory is overly broad and unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects to the extent this Interrogatory requests publicly available information.

SPECIAL INTERROGATORY NO. 4:

Please IDENTIFY each individual agent, consultant, employee, third-party contractor, OR ANY other individual engaged in work, at ANY time, between 1997 AND the present on behalf of Defendant BMS in the State of California, including his/her/its name, address, job title, and job description.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the terms "agent," "consultant," "third-party contractor," and "ANY other individual engaged in work." BMS further objects to the extent this Interrogatory is duplicative and cumulative of Interrogatory No. 5 and Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 4, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 5:

Please IDENTIFY each individual agent, consultant, employee, third-party contractor, OR ANY other individual engaged in work, at ANY time, between 1997 AND the present on behalf of Defendant BMS in the State of California in any way related to PLAVIX.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objec-

tions to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the terms "agent," "consultant," "third-party contractor," and "ANY other individual engaged in work." BMS further objects to the extent this Interrogatory is duplicative and cumulative of Interrogatory No. 4 and Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 4, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 6:

Please IDENTIFY all conferences, symposiums, lectures, meetings, retreats, OR other events in which PLAVIX was referred to or referenced that was attended, sponsored, OR otherwise affiliated with Defendant BMS that occurred in whole OR in part in the State of California at ANY time between 1997 AND the present.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclu-

sively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the terms "other events," "in which PLAVIX was referred to or referenced," and "otherwise affiliated with." BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 5, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 7:

Please describe in detail Defendant BMS's document retention policy OR policies, AND each of them, between 1997 AND the present, including the manner in which DOCUMENTS are stored, the length of time they are stored, AND how they are backed-up AND archived.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in t at it see s information from 1997 to the present. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not

relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the terms "in detail," "each of them," and "manner." BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 2, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory. BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' First Set of Requests for Production of Documents and Things to Defendant Bristol-Myers Squibb Company No. 1, and hereby incorporates by reference each General Objection and Objection to Instructions and Definitions in BMS's Response to Plaintiffs' First Set of Requests for Production of Documents and Things into BMS's Specific Objections to this Interrogatory. BMS further objects to the extent this Interrogatory seeks information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, joint defense privilege and/or common interest doctrine, as well as any other applicable privilege, protection and immunity against disclosure.

SPECIAL INTERROGATORY NO. 8:

Please IDENTIFY each location in which Defendant BMS maintains OR stores DOCUMENTS RELATED in ANY manner to PLAVIX, including but

not limited to databases, email servers, archives, data warehouses, common drivers, shared drives, custodial files, OR ANY other repository.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information with no temporal limit. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' First Set of Requests for Production of Documents and Things to Defendant Bristol-Myers Squibb Company No. 2, and hereby incorporates by reference each General Objection and Objection to Instructions and Definitions in BMS's Response to Plaintiffs' First Set of Requests for Production of Documents and Things into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 9:

Please IDENTIFY each current AND each former custodian of records for DOCUMENTS that RELATE or REFER to PLAVIX, including his/her name, address, job title, and job description, AND the dates he/she was/is employed in that capacity.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclu-

sively, in that it seeks information with no temporal limit. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the term "former custodian of records." BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' First Set of Requests for Production of Documents and Things to Defendant Bristol-Myers Squibb Company No. 3, and heresy incorporates by reference each General Objection and Objection to Instructions and Definitions in BMS's Response to Plaintiffs' First Set of Requests for Production of Documents and Things into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 10:

Please IDENTIFY all distributors, wholesalers, third-party entities that transported, shipped, OR otherwise placed into the stream of commerce ANY form of PLAVIX on behalf of Defendant BMS at ANY time between 1997 AND the present, including the gross amount of PLAVIX attributed to each such distributor per annum in dollar or pill amounts, whichever is easier.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory

is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence, especially, but not exclusively, to the extent it calls for information concerning activities outside the State of California. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the teens "distributors," "wholesalers," "third-party entities, and "otherwise placed into the stream of commerce." BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' First Set of Requests for Production of Documents and Things to Defendant Bristol-Myers Squibb Company No. 4, and hereby incorporates by reference each General Objection and Objection to Instructions and Definitions in BMS's Response to Plaintiffs' First Set of Requests for Production of Documents and Things into BMS's Specific Objections to this Interrogatory. BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter Nos. 6 and 7, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 11:

Please IDENTIFY the gross amount of sales in dollars for PLAVIX in the State of California for each year from 1997 to the present.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the term "gross amount." BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 8, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 12:

Please IDENTIFY the total number of PLAVIX pills distributed, shipped, or sold in the State of California for each year from 1997 to the present.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory

is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 8, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 13:

Please IDENTIFY the total number of PLAVIX samples distributed or shipped in the State of California for each year from 1997 to the present.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 9, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Rep-

resentative of Defendant Bristol-Myers Squib Company into BMS' Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 14:

Please IDENTIFY the total number of times that television commercials for PLAVIX appeared in the State of California for each year from 1997 to the present.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 10, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 15:

Please IDENTIFY the total number of times that print media advertisements for PLAVIX appeared in the State of California for each year from 1997 to the present.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 10, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 16:

Please IDENTIFY the total amount of money for each year from 1997 to the present that YOU paid or otherwise spent entertaining, feeding, or educating physicians and other medical health professionals in the State of California regarding the purported benefits of PLAVIX.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory

is vague and ambiguous, especially, but not exclusively, in its use of the teen "paid or otherwise spent." BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence.

SPECIAL INTERROGATORY NO. 17:

Please IDENTIFY the number the total amount of money spent on all forms of advertisements, marketing or other promotional campaigns for PLAVIX that appeared in the State of California for each year from 1997 to the present.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is confusing, especially, but not exclusively, in its use of the terms "the number the total amount." BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the terms "other promotional campaigns for PLAVIX." BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company Subject Matter No. 10, and hereby incorpo-

rates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 18:

Please IDENTIFY any consultants, market leaders, thought leaders, physicians or any other persons or entities who received funding from YOU or any of YOUR affiliates, partners, joint-venturers, predecessors or successors in interest, agents, or employees related to PLAVIX in the State of California for each year from 1997 to the present, including the amount of money each such person or entity was paid and the purpose for which they were so paid.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the terms "consultants," "market leaders," "thought leaders," "affiliates," "partners," "joint-venturers," "predecessors or successors in interest," "agents," and "employees." BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects to the extent this Interrogatory is duplicative and cumulative of Plaintiffs' Notice of Deposition of Corporate Representative of Defendant

Bristol-Myers Squibb Company Subject Matter No. 11, and hereby incorporates by reference each General Objection in BMS's Objections to Notice of Deposition of Corporate Representative of Defendant Bristol-Myers Squibb Company into BMS's Specific Objections to this Interrogatory.

SPECIAL INTERROGATORY NO. 19:

Please IDENTIFY any individuals, institutions, organizations, non-profits, political parties, or other entities in the State of California to which YOU paid or donated any amount of money for each year from 1997 to the present, including the amount of money paid and the reason such money was paid.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS objects that this Interrogatory is overly broad, especially, but not exclusively, in that it seeks information from 1997 to the present. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the terms "paid or donated." BMS further objects that this Interrogatory is unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence.

SPECIAL INTERROGATORY NO. 20:

Please IDENTIFY each PERSON that assisted, contributed to or reviewed YOUR responses to these Interrogatories and Plaintiffs' first set of requests for production of documents.

**Objection and Response:** BMS incorporates by reference each General Objection and Objection to Definitions and Instructions into its Specific Objections to this Interrogatory. BMS further objects that this Interrogatory is overly broad and unduly burdensome, seeks information that is not relevant to the claims or defenses of any party, and is not reasonably calculated to lead to the discovery of admissible evidence. BMS further objects that this Interrogatory is vague and ambiguous, especially, but not exclusively, in its use of the terms "assisted, contributed to or reviewed." BMS further objects to the extent this Interrogatory seeks information protected from disclosure by the attorney-client privilege, the attorney work product doctrine, joint defense privilege and/or common interest doctrine, as well as any other applicable privilege, protection and immunity against disclosure.

Dated: November 20, 2012

ARNOLD & PORTER LLP

By: */s/*_____

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*Attorneys for Bristol-Myers Squibb Company*

**PROOF OF SERVICE**

STATE OF CALIFORNIA )
) ss
COUNTY OF San Francisco )

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111.

On November 20, 2012, I served the foregoing document described as follows:

**RESPONSE OF DEFENDANT BRISTOL-MYERS SQUIBB COMPANY TO PLAINTIFFS' FIRST SET OF SPECIAL INTERROGATORIES**

on the interested parties by placing a true and correct copy thereof in a sealed envelope(s) addressed as follows:

Hunter J. Shkolnik
Kelly A. McMeekin
NAPOLI BERN RIPKA SHKOLNIK & ASSOCIATES LLP
525 S. Douglas Street, Suite 260
El Segundo, CA 90245
*Attorneys for Plaintiffs*

McKESSON CORPORATION
The Prentice Hall Corporation Systems, Inc.
2730 Gateway Oaks Dr., Suite 100
Sacramento, CA 95833
*Defendant*

William M. Audet
Joshua C. Ezrin
AUDET & PARTNERS LLP
221 Main Street, Suite 1460
San Francisco, CA 9410
*Attorneys for Plaintiffs*

☐ **BY MAIL** I placed such envelope with postage thereon prepaid in the United States Mail at Three Embarcadero Center, 7th Floor, San Francisco, California 94111. Executed on at San Francisco, California.

☐ **BY PERSONAL SERVICE** I caused such envelope to be delivered by hand to the office of the addressee. Executed on at San Francisco, California.

☐ **BY FACSIMILE** The above-referenced document (together with all exhibits and attachments thereto) was transmitted via Facsimile transmission to the addressee(s) as indicated on the attached mailing list on the date thereof. The transmission was reported as completed and without error. Executed on at San Francisco, California.

☒ **BY FEDERAL EXPRESS** I am readily familiar with Arnold & Porter LLP's business practices of collecting and processing items for pickup and next business day delivery by Federal Express. Under said practices, items to be delivered the next business day are either picked up by Federal Express or deposited in a box or other Facility regularly maintained by Federal Express in the ordinary course of business on that same day with the cost thereof billed to Arnold & Porter LLP's account. I placed such sealed envelope for delivery by Federal Express

to the offices of the addressee(s) as indicated on the attached mailing list on the date hereof following ordinary business practices. Executed on November 20, 2012 at San Francisco, California.

☒ **STATE** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

☐ **(VIA EMAIL)** by transmitting a true and correct copy via email the document(s) listed above on this date before 5:00 p.m. PST to the person(s) at the email address(es) set forth below.

*/s/* Jeremy M. McLaughlin
Jeremy M. McLaughlin

## EXHIBIT D

## BUSINESS ENTITY DETAIL

Data is updated to the California Business Search on Wednesday and Saturday mornings. Results reflect work processed through Tuesday, July 30, 2013. Please refer to Processing Times for the received dates of filings currently being processed. The data provided is not a complete or certified record of an entity.

| | |
|---|---|
| Entity Name: | BRISTOL-MYERS SQUIBB COMPANY |
| Entity Number: | C0166175 |
| Date Filed: | 03/16/1936 |
| Status: | ACTIVE |
| Jurisdiction: | DELAWARE |
| Entity Address: | 345 PARK AVE TAX DEPT 3RD FL |
| Entity City, State, Zip: | NEW YORK NY 10154 |
| Agent for Service of Process: | C T CORPORATION SYSTEM |
| Agent Address: | 818 W SEVENTH ST |
| Agent City, State, Zip: | LOS ANGELES CA 90017 |

* Indicates the information is not contained in the California Secretary of State's database.

- If the status of the corporation is "Surrender," the agent for service of process is automatically

revoked. Please refer to California Corporations Code section 2114 for information relating to service upon corporations that have surrendered.

- For information on checking or reserving a name, refer to Name Availability.
- For information on ordering certificates, copies of documents and/or status reports or to request a more extensive search, refer to Information Requests.
- For help with searching an entity name, refer to Search Tips.
- For descriptions of the various fields and status types, refer to Field Descriptions and Status Definitions.

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR - 1 201
OFFICE OF THE CL

No. 16-466

IN THE
# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
*Respondents*.

On Writ of Certiorari to the
California Supreme Court

## BRIEF FOR PETITIONER

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*Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTION PRESENTED

The Due Process Clause permits a state court to exercise specific jurisdiction over a defendant only when the plaintiff's claims "arise out of or relate to" the defendant's forum activities. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted). The question presented is:

> Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims—that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts.

## PARTIES TO THE PROCEEDING

1. Bristol-Myers Squibb Company, petitioner on review, was a defendant in the trial court and the petitioner below.

2. The Superior Court of California for the County of San Francisco, respondent on review, was the respondent below.

3. The following individuals, respondents on review, were plaintiffs in the trial court and the real parties in interest below: Jean A. Bookout, Dana A. Crawford, Cedric A. Creeks, Lara A. Ellis, Dorothy A. Emerson-Evans, James A. Gogerty, William A. Greene, Kathleen A. Herman, Ruth A. Konopka, Patrick A. McClelland, Velva A. Neeley, Barbara A. Tabbs, James A. Thomas, Shirley A. Tincher, John A. Tomlinson, Rex A. Victory, Elizabeth A. White, Richard A. White, Lorraine Adams, Francis W. Adams, Beverley Adams, Theodore Adams, Gwendolan E. Ailes, Ricky L. Alexander, George Allen, Marie Alvin, Michael Alvin, Cheryl Anders, Judy Anderson, Bracy Anderson, David E. Andrews, Beverly R. Andrews, June M. Angel, Georgia Ann Burgin, Ronald A. Arcaroli, Eileen J. Armstrong, Stanley B. Kowaleski, Teresa B. McClelland, Thomas B. Morrison, Willie B. Thomas, James B. Watson, Thomas Badell, Beulah Baham, Charlie Baker, Faye Baker, Hinton Barnes, Brenda Beach, Michael R. Beaton, Pauline Beaton, Mary Beattie, Laura Beavers, James Beavers, Allen Bell, John Bell, Robert Bennet, Sandra Bennet, Mary Lou Bingham, Brenda Boatwright, Timothy A. Bolyard, Joyce Boone, David Booth, Paula Booth, Jacqueline Boston, Charles Botkin, Barbara Botkin, Charlie Bowie, Deborah Boyles, Donald Bradford, Constance R. Branch,

**PARTIES TO THE PROCEEDING—Continued**

Harry L. Branch, Ernest Brantley, Norma J. Brevelle, Colene Broderick, Charles Broderick, Clayton P. Brown, Ronnie Brown, Wilbur Brown, Emily Brown, Gail Brown, Inez Brown, Philip Bryan, Deborah Burke, Sarah M. Burks, Lawrence C. Ballard, Robert C. Bratton, Grace C. Bratton, John C. Lisotta, Lesh C. Patrick, Kathleen Cade, Marvinette Callahan, Francis Campione, Betty Cantor, James Caouette, Bonnie Carpenter, Loney Carpenter, Donna Carrop, Linda Carter, Eugene Carter, Denise Casey, Carlton Cash, Tina Cash, Maria Celaya, Raphael Cerpa, Louise Cerpa, Jesus Cervantes, Emily Cervantes, Ben Chatter, Josephine F. Chavarria, Nellie Chenoweth, Patrick Clark, Patti Clark, Mildred Clark, Linda Cody, Sam Colamartino, Donald Cole, Betty Cole, Carl Collins, Estela Colunga, Senorina Colunga, Shirley Cook, Ella Cook, Robert Cook, Delores Cook, John Cook, James Corbett, Frank W. Cornwell, Clifford Cox, Chad Crank, Angela Crawford, Marvelene W. Crawford, Christine M. Crawford, John L. Crawley, Phoebe A. Crawley, David D. Applen, Ellarhee D. Dowler, Danny D. Dowler, Lily D. Hudson, Jeffrey D. Lang, Anthony D. Patton, Carol D. Renstrom, Jerrel D. Spencer, Robert D. Swanner, Patricia D. Watson, Rhonda D. Watson, James E. Dailey, Alexandra Dailey, Michele Dargento, Rosamaria Dargento, Debra Davies, Marion Davis, Dale A. Davis, Jolene Davis, Thomas Davis, Marcia Davis, Timothy Deegan, Patti G. Deegan, Das Deendial, Toolsaidai Deendial, Howard Diamond, Rebecca Diamond, Dennis W. Dodson, Leslie K. Dodson, Charles W. Drake, Linda Drake, Theresa J. Dunlap, Olivia Dunn, Michael J. Dunn Sr., Willie E. Anderson, Paul E. Bragg Jr., Maxine E. Brown,

**PARTIES TO THE PROCEEDING—Continued**

Charles E. Bryant, Glen E. Burgin, Sharon E. Burk, Harold E. Evans, James E. Farmer, Maria E. Gutierrez, Frances E. Jones, Douglas E. Mallett, Sherry E. Mcknight, Richard E. Sabin, Donald E. Witt, Patricia A. Eaton, Elisha Edge, Victoria Edge, Toni Edwards, David Egan, Gerald R. Ewing, Kandy A. Ewing, William F. Cook, Roberta F. Ehmer, Jose F. Gutierrez, James Faulcon, Gladys Faulcon, Robert F. Ferranti, Thomas R. Finson, Jeannette Fischer, Roy Fitch, Ruby Fitch, Catherine Fleenor, Eddievies Flenoury, Donald Fletcher, Rita Fletcher, Angela Flowers, Beth Foust, Jerry G. Foust, Nickiilynn Fowler, William R. Fox, Charles Franklin, Beverly A. Frazier, Bobby G. Bingham, Lester G. Boutwell, Walter G. Burk, Paul G. Ehmer, Lloyd G. Gregg, Donald G. Jones, Jane G. Ordway, Anthony G. Williams, Michael G. Zawicki, Carmen M. Garcia, Lindy Garcia, Jose L. Garriga, Bernard J. Garstecki, Helen Garstecki, Richard T. Gesiorski, Dolores Gesiorski, Albert L. Gilkerson, Loretta F. Gilkerson, Thomas C. Glassburner, Linda L. Glassburner, Jose Gonzales, Senaida Gonzales, Maurillia G. Gonzalez, Richard F. Gordon, Cindy Green, Mary Greene, Shelby Greene, Delores R. Griego, Marie F. Grimes, Jacqueline H. Groce, Phillip M. Grohs, Sylvia Grohs, Robert Groves, Virginia Groves, Dorothy H. Dulaney, Andrew H. Frye, Rhonda H. Grim, Paul H. Sheppard, Michael W. Hagood, Charlotte Hagood, Richard L. Haithcock, Vicki Haithcock, Sandra J. Hall, Gary W. Halliburton, Sandra Halliburton, William Hammond, Mary Ellen Hammond, Robert L. Harris, Anna Harris, Joanne Harris, Kennedy L. Harris, Jr., Shara L. Harrison, George M. Harrison, Diana L. Hayden, Donald E. Hayes, Teresa Hayes, Angela

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**PARTIES TO THE PROCEEDING—Continued**

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## RULE 29.6 DISCLOSURE STATEMENT

Bristol-Myers Squibb Company has no parent corporation, and no publicly held company owns 10 percent or more of Bristol-Myers Squibb Company's stock.

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IN THE

# Supreme Court of the United States

No. 16-466

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
*Respondents.*

On Writ of Certiorari to the
California Supreme Court

## BRIEF FOR PETITIONER

## INTRODUCTION

Respondents are individuals from 33 States who sued Bristol-Myers Squibb Company in California for injuries they allegedly suffered after taking the prescription drug Plavix. It is undisputed that Bristol-Myers did not develop or manufacture Plavix in California; that the drug was not marketed, promoted, or distributed to respondents in California; and that respondents did not receive or fill their prescriptions, ingest the drug, or suffer any injuries in California. Indeed, respondents do not dispute that their claims would be exactly the same if Bristol-Myers had never conducted business in California at all.

Nonetheless, the California Supreme Court found that Bristol-Myers was subject to specific jurisdiction in California on respondents' claims. It did so by employing a "sliding scale approach" in which "wide[r] ranging" contacts could make up for the lack of any causal connection between respondents' claims and California. Pet. App. 32a (internal quotation marks omitted). The court concluded that Bristol-Myers could be haled into California on respondents' claims merely because Bristol-Myers sold Plavix to *other* persons and developed *other* products in the State.

That is not how specific jurisdiction works. Since *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), this Court has made clear time and again that "specific or case-linked" jurisdiction requires a causal connection between the defendant's forum conduct and the litigation. *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919 (2011). That bedrock requirement ensures that a common connection links the defendant, the forum, and the litigation; that States do not assert jurisdiction over matters occurring and directed entirely outside their borders; and that any litigation to which a defendant is subject is a direct and foreseeable consequence of its in-state activities. Courts cannot dispense with this causation requirement because a defendant has wide-ranging contacts with a State. Only *general* jurisdiction allows that, and then only where the defendant is at home.

Accordingly, the California court's assertion of specific jurisdiction in this case was improper. None of Bristol-Myers's activities in California played any part in bringing about respondents' alleged injuries,

and so Bristol-Myers cannot be haled into California court to answer respondents' claims.

## OPINIONS BELOW

The California Supreme Court's opinion is reported at 377 P.3d 874. Pet. App. 1a-90a. The California Court of Appeal's decision denying Bristol-Myers's petition for a writ of mandate is reported at 175 Cal. Rptr. 3d 412. Pet. App. 91a-146a. The California Superior Court's opinion denying Bristol-Myers's motion to quash service of the summons is unreported. *Id.* at 147a-150a.

## JURISDICTION

The California Supreme Court entered judgment on August 29, 2016. Bristol-Myers filed a petition for a writ of certiorari on October 7, 2016, and this Court granted the petition on January 19, 2017. The Court's jurisdiction rests on 28 U.S.C. § 1257(a). *See Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) (the California Supreme Court's disposition of a writ petition is a final judgment under § 1257(a)).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

California Code of Civil Procedure § 410.10 provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

## STATEMENT

1. Plavix is a prescription drug that helps prevent strokes, heart attacks, and other cardiovascular problems by inhibiting blood clots. Pet. App. 2a. Plavix is manufactured by Bristol-Myers, a global biopharmaceutical company that is incorporated in Delaware, has its headquarters in New York, and conducts substantial operations in New Jersey. *Id.* at 4a; J.A. 82. Bristol-Myers "performed or directed" its work on the development, manufacture, labeling, marketing, and regulatory approval of Plavix from its "New York headquarters and New Jersey operating facilities." Pet. App. 5a; *see* J.A. 85. None of that work was "accomplished or directed by employees working in California." J.A. 85.

Respondents are 575 non-California residents who sued Bristol-Myers in California state court in 2012, alleging injuries from taking Plavix. Pet. App. 1a, 147a; Pet. 5 & n.1. Respondents reside in 33 other States, including Alabama, Alaska, Indiana, Kansas, Kentucky, Louisiana, New Jersey, Ohio, Oklahoma, Oregon, Texas, and West Virginia. Pet. App. 2a-3a; J.A. 25-41. They appear as individual co-plaintiffs on eight separate complaints, alongside 86 California residents. Pet. App. 2a.[1]

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[1] Respondents' complaints are materially identical, and one is included in the joint appendix as a representative example. J.A. 20-74. As in the complaints, the briefs and opinions below at times refer to "resident" and "non-resident" plaintiffs. Bristol-Myers has never argued, however, that a plaintiff's California residence by itself has any significance. *See* Bristol-Myers Cal. S. Ct. Reply Br. 11; *Walden* v. *Fiore*, 134 S. Ct. 1115, 1125 (2014) ("[M]ere injury to a forum resident is not a sufficient connection to the forum."). Rather, in the context of this

Each complaint names as defendants Bristol-Myers and McKesson Corporation, a California-based pharmaceutical distributor. *Id.* at 2a-3a. Each respondent individually asserts various California state-law claims, alleging that Bristol-Myers "negligently designed and manufactured Plavix, failed to disclose material information in its advertising and promotion of Plavix[,] and fraudulently and falsely advertised and promoted the product." *Id.* at 27a; *see* J.A. 42. The circumstances pertaining to respondents' claims—such as when and why each respondent was prescribed Plavix, how many years he or she took the medication, when he or she started to experience side-effects, and what those side-effects were—differ from person to person. J.A. 25-42; *see also* J.A. 73 (requesting individualized damages for medical expenses, earnings losses, and future medical monitoring).

2. Bristol-Myers removed respondents' eight complaints to federal court, but the federal court remanded for lack of subject matter jurisdiction. *See* Pet. App. 95a.[2] The Judicial Council of California

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case, "non-resident plaintiffs" is shorthand for those who were not prescribed or dispensed Plavix in California, and "resident plaintiffs" is shorthand for those who were. As described below on p. 6, respondents have never alleged that they were prescribed or dispensed Plavix in California.

[2] Bristol-Myers argued that the actions were removable because respondents had structured their complaints to avoid federal subject matter jurisdiction—not only by fraudulently joining McKesson so as to eliminate complete diversity, but also by dividing the plaintiffs across eight complaints so as to avoid qualifying as a "mass action" under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(11)(B). *See* Order Granting Pls.' Mot.

then assigned respondents' complaints to a single state trial judge as a "coordinated matter." *Id.* at 4a; *see* J.A. 75-78. Bristol-Myers moved to quash service of respondents' summonses and to dismiss their claims for lack of personal jurisdiction. J.A. 79-81; *see* Cal. Civ. Proc. Code §§ 410.10, 418.10(a)(1).

Bristol-Myers argued that it was not subject to specific jurisdiction on respondents' claims because those claims did not arise out of or relate to any contact Bristol-Myers had with California. *See* Pet. App. 96a. Bristol-Myers did not research or develop Plavix in California. *Id.* at 5a, 133a; J.A. 85. It has never manufactured Plavix in California. Pet. App. 5a, 133a; J.A. 85. And "[n]one of the work related to the labeling, packaging, regulatory approval, or development and direction of the advertising or marketing strategy" for Plavix took place in California. J.A. 85; *see* Pet. App. 5a, 133a. Respondents, moreover, were not prescribed Plavix by doctors in California, did not have their prescriptions filled by pharmacies in California, and did not receive Plavix distributed by McKesson from California. *See* Pet. App. 134a (respondents' "injuries did not occur in the course of [Bristol-Myers's] direct delivery of Plavix to the California market"); *id.* at 46a-48a, 59a-60a (dissent noting that "at no point have real parties argued McKesson bore any responsibility in providing them with Plavix"). They also did not ingest Plavix in California, suffer injury in California, or receive treatment in California. *Id.* at 4a, 33a-34a.

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To Remand, *Caouette* v. *Bristol-Myers Squibb Co.*, No. C-12-1814 (N.D. Cal. Aug. 10, 2012), ECF No. 35.

Bristol-Myers further argued that it was not subject to general jurisdiction in California because it was not "at home" there. *Id.* at 96a-97a. Its sales of Plavix in California constitute only 1.1 percent of its total national sales revenue. *Id.* at 5a; J.A. 85. Less than 11 percent of its sales force covers "any part" of the State. J.A. 84. And it employs just 3 percent of its U.S. workers there. *See* J.A. 82 (414 total California employees); J.A. 84 (12,598 total U.S. employees). Bristol-Myers's other connections to California involve a small government-affairs office in Sacramento and four research facilities that conduct research on *other* drugs. Pet. App. 5a, 29a; J.A. 82.

The California Superior Court denied Bristol-Myers's motion, holding that the company was subject to general jurisdiction in California because it engaged in "wide-ranging, continuous, and systematic activities" in the State. Pet. App. 150a. Bristol-Myers petitioned for a writ of mandate. *See* Cal. Civ. Proc. Code § 418.10(c). On the same day that this Court in *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014), rejected an assertion of general jurisdiction over a corporation in California, the California Court of Appeal denied the writ. J.A. 9. Soon after, the California Supreme Court vacated that denial and directed the Court of Appeal to issue an order to show cause why the writ should not be granted. J.A. 9-10. On remand, the Court of Appeal concluded that, in light of *Daimler*, Bristol-Myers was *not* subject to general jurisdiction in California. Pet. App. 100a-114a. The court nevertheless denied the writ on a different ground: that Bristol-Myers was subject to specific jurisdiction because respondents' claims were sufficiently related to Bristol-Myers's California activities. *Id.* at 114a-146a.

3. The California Supreme Court affirmed in a 4-to-3 decision. *Id.* at 1a-90a.

a. The majority agreed with Bristol-Myers that it was not subject to general jurisdiction in California. *Id.* at 9a-19a. Applying *Goodyear* and *Daimler*, the majority held that Bristol-Myers was not "at home" in the State. *Id.* at 16a-19a. Bristol-Myers was not incorporated or headquartered in California—the two paradigm bases for general jurisdiction. *Id.* at 16a. And Bristol-Myers's California activities were not so significant in comparison to its activities elsewhere as to allow Bristol-Myers to be "sued in California on any cause of action, whether or not related to its activities [t]here." *Id.* at 17a.

The majority nonetheless held that Bristol-Myers was subject to specific jurisdiction on respondents' claims. *Id.* at 20a-44a. The court reached this conclusion by applying what it called "a sliding scale approach" to determining whether respondents' claims arose out of or related to Bristol-Myers's California contacts. *Id.* at 32a. As its name suggests, the sliding scale involves a judicial balancing of "the intensity of [the defendant's] forum contacts and the connection of the [plaintiff's] claim to those contacts." *Id.* at 22a (internal quotation marks omitted). These factors, the majority explained, are "inversely related": "The more wide ranging the defendant's forum contacts, the more readily" a California court can find a "connection" sufficient to establish specific jurisdiction. *Id.* (internal quotation marks and brackets omitted). Critically, under the sliding scale, the defendant's forum contacts "need not be either the proximate cause or the 'but for' cause of the plaintiff's injuries." *Id.*

Applying the sliding scale, the majority found that Bristol-Myers's general business activities in California were sufficient to subject the company to specific jurisdiction on respondents' claims. *Id.* at 27a-34a. Bristol-Myers, it observed, sold Plavix in California as part of a "nationwide course" of "marketing, promotion, and distribution." *Id.* at 28a. Although respondents themselves did not ingest Plavix that had been marketed, promoted, or distributed in California, the majority viewed respondents' claims as concerning "the same allegedly defective product" and the same "assertedly misleading marketing and promotion of that product." *Id.*

Moreover, the majority added, Bristol-Myers "maintains research and laboratory facilities in California." *Id.* at 29a. Although "there is no claim that Plavix *itself* was designed and developed in these facilities," or that respondents' claims "arise out of [Bristol-Myers's] research conduct in this state," the majority thought the company's "research and development activity" in the State provided "an additional connection" relevant to the jurisdictional inquiry. *Id.* (emphasis added).

Brushing aside Bristol-Myers's assertion that respondents' claims "would be exactly the same if [Bristol-Myers] had no contact whatsoever with California," *id.*, the majority emphasized instead that Bristol-Myers's "contacts with California are substantial and the company has enjoyed sizable revenues from the sales of its product here," *id.* at 32a. The majority therefore concluded that, under the "sliding scale approach," these "extensive contacts with California establish minimum contacts based on a less direct connection between [Bristol-

Myers]'s forum activities and plaintiffs' claims than might otherwise be required." *Id.*

b. Justice Werdegar, joined by Justices Chin and Corrigan, dissented. *Id.* at 46a-87a.

The dissenters agreed that Bristol-Myers was not subject to general jurisdiction in California. *Id.* at 46a. But they strongly disagreed that respondents' claims could be said to arise out of or relate to Bristol-Myers's California activities. *Id.* at 51a. The majority's contrary conclusion, the dissenters explained, "is not supported by specific jurisdiction decisions from the United States Supreme Court * * * or the lower federal and state courts." *Id.* at 49a. And the dissenters faulted the majority for "undermin[ing] [the] essential distinction between specific and general jurisdiction." *Id.* at 50a. If the requisite connection between the forum and the litigation is established merely because a defendant has engaged in nationwide conduct—such that the conduct at issue in the plaintiff's claims is similar to conduct that also allegedly occurred in the forum—specific jurisdiction is "expand[ed]" "to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction." *Id.* And that result eviscerates the limits on general jurisdiction that this Court articulated in *Daimler*. As the dissenters explained, what this Court "wrought in *Daimler*—a shift in the general jurisdiction standard from the 'continuous and systematic' test * * * to a much tighter 'at home' limit—[the majority] undoes today under the rubric of specific jurisdiction." *Id.* at 50a-51a.

This Court granted certiorari.

## SUMMARY OF ARGUMENT

I. Seventy-two years ago in *International Shoe*, the Court held that a state court can exercise specific jurisdiction over a nonresident defendant only where the defendant has "certain minimum contacts * * * such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 (2014) (quoting *International Shoe*, 326 U.S. at 316). That inquiry "focuses on the relationship among the defendant, the forum, and the litigation," *id.* (internal quotation marks omitted), which requires determining two things: (1) whether the defendant "purposefully avail[ed]" itself of the forum, and (2) whether the plaintiff's claims "arise out of or relate to" the defendant's forum contacts. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472-476 (1984) (internal quotation marks omitted). Both of these requirements must be met for specific jurisdiction to be proper; neither can be dispensed with.

And for seven decades, the Court has made clear what it means for a claim to "arise out of or relate to" a defendant's forum contacts: The defendant's activities in the State must be a *cause* of the plaintiff's suit. In every specific jurisdiction case since *International Shoe*, the Court has relied on the existence or absence of a causal link in assessing whether jurisdiction exists. No decision has suggested any other type of relationship would suffice.

That makes sense. Specific jurisdiction requires the defendant to engage in conduct that simultaneously connects the defendant, the forum, and the litigation. It is well-established that the defendant must "form" the first link of this relationship—

between the defendant and the forum—through its own conduct. *Walden*, 134 S. Ct. at 1122. It follows that the second link—between the forum and the litigation—must be a continuation of the same causal chain; otherwise, there would be no common connection between "the defendant, the forum, and the litigation." *Id.* at 1121 (internal quotation marks omitted).

The purposes behind the specific jurisdiction doctrine reinforce this conclusion. The limits inherent in our federal structure prohibit States from enforcing obligations that a defendant incurred exclusively through conduct undertaken in and directed at other States. Absent a causal requirement, defendants would lack fair notice as to where their conduct would subject them to suit. And dispensing with causation would force defendants to defend claims in a place where none of the conduct giving rise to the suit occurred—a situation unfair to litigants and States alike.

The California Supreme Court erred, then, in adopting a "sliding scale approach" that deems a causal link unnecessary so long as a defendant has other, "wide ranging" contacts with the State. Pet. App. 32a (internal quotation marks omitted). That shifting standard "confus[es]" specific jurisdiction with general, *Goodyear*, 564 U.S. at 919, and effectively subjects national companies to a form of the "unacceptably grasping" jurisdictional test this Court rejected in *Daimler*, 134 S. Ct. at 760.

II. Not only is a causal link required, but a defendant's forum conduct must be a *proximate* cause of the plaintiff's claim. That is what this Court said in *Burger King*. *See* 471 U.S. at 474. And the Court

has found specific jurisdiction lacking where some lesser causal relationship was present.

The logic and purposes of specific jurisdiction also compel this conclusion. Just as "random, fortuitous, or attenuated" contacts do not establish a constitutionally sufficient connection between a defendant and the forum to satisfy the purposeful availment requirement, *id.* at 475 (internal quotation marks omitted), those same sorts of loose affiliations should not establish a constitutionally sufficient link between the forum and the litigation to satisfy the "arise out of or relate to" requirement. And a proximate cause test preserves limits on state authority, ensures predictability and administrability, and prevents defendants from being haled into court for suits that have no reasonable, foreseeable connection to anything the defendant did in the State.

III. Under any standard of causation, respondents' claims should be dismissed. Respondents sought to establish jurisdiction by showing that Bristol-Myers marketed Plavix to *other* individuals from California and developed *other* products there. Respondents have identified nothing Bristol-Myers did in the State that gave rise to *their* claims. It is irrelevant that claims against another defendant and claims brought by other plaintiffs are subject to California's jurisdiction; for jurisdiction to be proper, a plaintiff must identify acts connecting each defendant to the plaintiff's own claims.

If respondents wished to sue Bristol-Myers in a single consolidated action, they had many ways to do so. For instance, they could have sued Bristol-Myers in New York or Delaware, where it is at home; they could have brought their product defect and false

advertising claims in New York or New Jersey, where Bristol-Myers performed or directed the relevant activities, *see* J.A. 85; or they could have filed in federal court and participated in the multi-district litigation process, rather than structure their complaints to avoid federal subject matter jurisdiction. What respondents could not do was sue Bristol-Myers in California, a State in which none of the conduct that gave rise to their claims occurred. The California Supreme Court held to the contrary, and its decision should be reversed.

## ARGUMENT

### I. SPECIFIC JURISDICTION REQUIRES A CAUSAL CONNECTION BETWEEN THE DEFENDANT'S FORUM CONTACTS AND THE PLAINTIFF'S CLAIM

Every defendant has a "liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King*, 471 U.S. at 471-472 (quoting *International Shoe*, 326 U.S. at 319). The Due Process Clause protects that interest by "set[ting] the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear*, 564 U.S. at 923. Under the Clause, "[a] court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 880 (2011) (plurality opinion) (quoting *International Shoe*, 326 U.S. at 316). In giving content to that requirement, this Court has long differentiated between two types of personal jurisdic-

tion: (1) "general or all-purpose jurisdiction," and (2) "specific or case-linked jurisdiction." *Goodyear*, 564 U.S. at 919.

General jurisdiction depends on the *intensity* of a defendant's affiliations with a State relative to his activities as a whole. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home"—such as its place of incorporation or its principal place of business. *Daimler*, 134 S. Ct. at 760 (internal quotation marks omitted). Indeed, "general jurisdiction requires affiliations so continuous and systematic as to render [a] foreign corporation * * * comparable to a domestic enterprise in that State." *Id.* at 758 n.11 (internal quotation marks and brackets omitted). And where a defendant is at home, it is subject to "all-purpose" jurisdiction: It "may be sued on any and all claims," *id.* at 760, including claims "arising from dealings entirely distinct from" its activities within the State, *id.* at 754 (internal quotation marks omitted).

Specific jurisdiction, by contrast, depends on there being a "*relationship* among the defendant, the forum, and the litigation." *Walden*, 134 S. Ct. at 1121 (emphasis added) (internal quotation marks omitted). That relationship requires two links. First, there must be a link between the defendant and the forum. For that link to be present, the defendant must "*purposefully* avail[]" himself of "the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Goodyear*, 564 U.S. at 924 (emphasis added) (internal quotation marks omitted). The

"defendant *himself*" must be the one who "form[s] the necessary connection with the forum State." *Walden*, 134 S. Ct. at 1122 (internal quotation marks omitted). And the defendant's connection with the forum must be the "proximate[] result" of his conduct—not just a "random, fortuitous, or attenuated" consequence of what the defendant did. *Burger King*, 471 U.S. at 475 (internal quotation marks omitted); *see also Walden*, 134 S. Ct. at 1123 (similar).

Second, there must be a link between the forum and the litigation. As this Court has held, the litigation must "aris[e] out of or relate[] to the defendant's contacts with the forum." *Daimler*, 134 S. Ct. at 754 (quoting *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984)). This requirement ensures that jurisdiction is "case-linked," *Walden*, 134 S. Ct. at 1121 n.6: If a defendant's activities in a State "*give rise to* the liabilities sued on," jurisdiction is proper regardless of the extent to which the defendant is otherwise "[p]resen[t]" in the State. *International Shoe*, 317 U.S. at 317 (emphasis added) (internal quotation marks omitted).[3]

This case is about the second link, between the forum and the litigation. Since *International Shoe*, the Court has been unwavering in its insistence that specific jurisdiction exists only where the defendant's

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[3] Even if both links are established, a defendant may argue that a state court lacks specific jurisdiction over it if the exercise of jurisdiction would "offend 'traditional notions of fair play and substantial justice.'" *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 113 (1987) (quoting *International Shoe*, 326 U.S. at 316).

contacts with the forum *caused* the plaintiff's alleged injuries and the resulting suit. Requiring such a causal link makes sense in light of the specific jurisdiction inquiry as a whole. And it promotes the purposes—federalism, predictability, and fairness—that undergird the doctrine. The California Supreme Court's conclusion that causation could be dispensed with so long as the defendant's contacts are sufficiently "wide ranging" is wrong; that so-called "sliding scale approach" lacks any footing in this Court's precedent, and impermissibly blurs specific jurisdiction with general.[4]

### A. The Court Has Invariably Understood "Arise Out Of Or Relate To" As Requiring A Causal Link

This Court's cases have consistently found that a claim arises out of or relates to the defendant's forum contacts only if there is a causal connection between those contacts and the claim. No case has deviated from this understanding.

Start with *International Shoe*, where the Court first developed the modern personal jurisdiction doctrine. There, the Court considered whether an out-of-state sales company could be sued in Washington for unpaid unemployment contributions. Articulating the now-canonical test for specific jurisdiction,

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[4] This case presents a question under the Due Process Clause of the Fourteenth Amendment, not the Fifth Amendment. It thus provides "no occasion" for this Court to address the application of the Fifth Amendment to the exercise of personal jurisdiction by a federal court. *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (internal quotation marks omitted).

the Court held that specific jurisdiction exists where "the activities of [a] corporation * * * *give rise to* the liabilities sued on," but not, "[c]onversely," where the "causes of action [are] *unconnected* with [the corporation's] activities" in the State. 326 U.S. at 317 (emphases added). Applying that test, the Court held that jurisdiction was proper because the plaintiff's injuries (unpaid contributions) resulted from the defendant's forum contacts: Because "[t]he obligation which is here sued upon *arose out of*" the defendant's sales and marketing activities "in the State," the company had "rendered itself amenable to suit" over the unpaid contributions in the State's courts. *Id.* at 320-321 (emphasis added).

*Burger King* took the same causal approach to assessing the link between the forum and the litigation. Much like in *International Shoe*, the Court said that specific jurisdiction is proper where "the litigation results from alleged injuries that 'arise out of or relate to' th[e] [defendant's] activities" in the forum State. *Burger King*, 471 U.S. at 472 (internal quotation marks omitted). And that connection exists, the Court explained, where the litigation seeks to hold a defendant "to account * * * for *consequences that arise proximately* from such activities." *Id.* at 474 (emphasis added). Thus, a franchisee could be sued in Florida for a "franchise dispute [that] *grew directly out of*" a contract negotiated and performed there and that "*caused* foreseeable injuries" in the State. *Id.* at 479-480 (emphases added).

In each of its specific jurisdiction cases since then, the Court has invariably done the same—relying, in applying the "arise out of or relate to" requirement, on the presence (or absence) of a causal connection

between the defendant's forum contacts and the plaintiff's claim. In *Goodyear*, the litigation lacked a sufficient link to any North Carolina contact by the defendant "[b]ecause the episode-in-suit, the bus accident, occurred in France, and *the tire alleged to have caused the accident was manufactured and sold abroad*." 564 U.S. at 919 (emphasis added). And in *Walden*, the Court held that the plaintiff could not bring a tort suit in Nevada because it was "undisputed that *no part of* [*the defendant's*] *course of conduct occurred in Nevada*" and the plaintiffs had not been injured "*because* [of] anything" the defendant did there. 134 S. Ct. at 1124-1125 (emphases added).

One could easily go on. The Court has held that courts could exercise specific jurisdiction over claims because they "*ar*[*o*]*se*[] *out of* the very activity being conducted" in the State, *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) (emphasis added); were "*based on* a contract" delivered and performed in the forum, *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (emphasis added); or "would not have occurred *but for*" the defendants' forum contacts, *Walden*, 134 S. Ct. at 1124 (emphasis added) (describing *Calder* v. *Jones*, 465 U.S. 783 (1984)).

By contrast, the Court has rejected assertions of jurisdiction because the claims at issue did not "arise[] out of an act done or transaction consummated in the forum State," *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958); "ar[o]s[e] from a separation that occurred" elsewhere, *Kulko* v. *Superior Court*, 436 U.S. 84, 97 (1978); or did not "*stem from* a constitutionally cognizable contact with" the forum, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 299 (1980) (emphasis added). Every one of the

Court's cases is to the same effect; in no instance has the Court found specific jurisdiction based on any relationship other than a causal one between the defendant's forum contacts and the plaintiff's suit.

Respondents nonetheless contend that the Court's cases do not require a causal link to satisfy the "arise out of or relate to" requirement. Br. in Opp. 14. They do not identify any holding or any reasoning in this Court's precedents to support that view. Rather, they claim that by using the formulation "arise out of *or* relate to," the Court necessarily meant to establish two different classes of sufficient connections between a defendant's forum contacts and a plaintiff's claim: arise out of (cause) and relate to (whatever that means).

Not so. The first time the Court used the phrase "arise out of or relate to" in *Helicopteros*, it expressly "decline[d] to reach the question[] *** whether the terms 'arising out of' and 'related to' describe different connections between a cause of action and a defendant's contacts with a forum." 466 U.S. at 415 n.10. The only member of the Court who suggested those words had different meanings was Justice Brennan, in dissent. *Id.* at 425 (Brennan, J., dissenting). And even he indicated that "related to" required *some* causal connection: In his view, the plaintiffs' wrongful-death suit "related to" the defendant's Texas contacts because "negotiations that took place in Texas *led to*" the helicopter flight that crashed, the helicopter "was purchased" by the defendant in Texas, and the allegedly negligent pilot, who was employed by the defendant, "was actually trained" in Texas. *Id.* at 426 (emphasis added).

Moreover, *Helicopteros* appears to have drawn the words "related to" from *International Shoe*, and the *Shoe* Court made plain it regarded "arising from" and "related to" as two sides of the same coin. In describing what is now known as general jurisdiction, the Court held that although jurisdiction normally cannot be asserted over "suits *unrelated to* [in-state] activity," a corporation's forum contacts may be sufficiently continuous and substantial to justify suits "*arising from* dealings entirely distinct from those activities." 326 U.S. at 318 (emphases added). In another doublet, the Court explained that although jurisdiction "has never been doubted" where in-state activities "*give rise to* the liabilities sued on," isolated in-state activities do not, "[c]onversely," permit "causes of action *unconnected with* the activities there." *Id.* at 317 (emphases added). The Court thus treated these words as opposites or "[c]onverse[s]"—not distinct terms of art. *Id.* And at the end of the day, what mattered to the Court was that the company in question had been sued on "obligations *arising out of* the activities of its salesmen in Washington"; more nebulous notions of relatedness played no part in the analysis. *Id.* at 321 (emphasis added).

Since then, the Court has continued to treat "arise out of or relate to" as a single, causal requirement. As discussed, it has always examined simply whether a causal link is present. In no case has the Court suggested that "relate[s] to" embodies some separate way of establishing jurisdiction, nor has the Court applied that term on its own. Indeed, in several cases, the Court has omitted the words "relate to" from its formulation altogether. *See Walden*, 134 S. Ct. at 1122 (a suit "must arise out of [the defend-

ant's] contacts * * * with the forum State"); *Keeton*, 465 U.S. at 780 (specific jurisdiction is warranted "when the cause of action arises out of the very activity being conducted, in part, in [the State]"); *Hanson*, 357 U.S. at 251 ("The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State.").

Ultimately, then, respondents' argument boils down to nothing more than the sense that because the Court has used two different words, each one must mean something different. But "this [wa]s an opinion, bear in mind, not a statute." *Nevada* v. *Hicks*, 533 U.S. 353, 372 (2001). Courts "frequently say two (or more) things when one will do or say two things as a way of emphasizing one point": "cease and desist," "arbitrary and capricious," "good faith and fair dealing." *TMW Enters., Inc.* v. *Fed. Ins. Co.*, 619 F.3d 574, 578 (6th Cir. 2010) (Sutton, J.); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 177 (2012) ("Doublets and triplets abound in legalese."). Absent a reason to think "arise out of" and "relate to" mean different things—and nothing in the Court's opinions suggests they do—that phrase is just another example.

### B. A Causal Requirement Makes Sense In Light Of The Specific Jurisdiction Inquiry As A Whole

Viewing the "arise out of or relate to" requirement within the context of the personal jurisdiction inquiry as a whole confirms that there must be a causal link between the defendant's forum contacts and the plaintiff's claim.

As the Court has repeatedly explained, "[t]he inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." *Walden*, 134 S. Ct. at 1121 (internal quotation marks omitted). And as noted above, this relationship consists of two links: the connection between the defendant and the forum, and the connection between the forum and the litigation.

With respect to the first link—whether the defendant has purposefully availed himself of the forum—this Court has already imposed a causation requirement: The defendant must *cause* the contacts with the forum. As *Walden* explained, the defendant's relationship with the forum "must arise out of contacts that the 'defendant *himself*' *creates* with the forum state." *Id.* at 1122 (second emphasis added) (quoting *Burger King*, 471 U.S. at 475). Those contacts cannot be the result of the "'unilateral activity' of a plaintiff." *Id.* at 1123 (quoting *Burger King*, 471 U.S. at 475). Rather, "it is the *defendant's* conduct that must *form* the necessary connection." *Id.* at 1122 (emphases added).

The second link—between the forum and the litigation—should be viewed as simply a continuation of the same causal chain. This Court's decisions, after all, speak of "*the* relationship among the defendant, the forum, and the litigation." *Id.* at 1121 (emphasis added) (internal quotation marks omitted). And so just as the defendant's conduct must *cause* the contacts in the forum, those contacts must *cause* the plaintiff's claim—forming a single chain of causation running from the defendant through the forum to the

litigation. In *Walden*'s words, the same conduct that "create[s] a substantial connection with the forum State" must also be "suit-related." *Id.* Put differently, the same conduct that "translate[s] into 'contacts' with a particular State" must also "give[] rise to th[e] litigation." *Id.* at 1125 n.9. For specific jurisdiction to exist, therefore, an unbroken chain of causation must unite the defendant, the forum, and the litigation.

There is also a more practical reason to think causation is required for both the first and the second links of the defendant-forum-litigation relationship. This Court has developed a robust body of law over a period of decades to clarify what sort of connection is necessary to establish the first link—between the defendant and the forum. It would make little sense to ignore that precedent and begin anew when defining the type of connection that must create the second link—between the forum and the litigation. The Court should simply apply the same well-developed standards that govern the purposeful availment inquiry to the "arise out of or relate to" requirement, and insist on the same causal connection at each step.

Indeed, that is exactly the approach the Court has previously suggested. In *Burger King*, the Court described the link between the defendant and the forum by saying that "[j]urisdiction is proper * * * where the [defendant's] contacts [with the forum] *proximately result* from actions by the defendant." 471 U.S. at 475 (emphasis added). A page apart, it described the link between the forum and the litigation using almost exactly the same words: A defendant cannot "escape having to account * * * for conse-

quences that *arise proximately* from such activities." *Id.* at 474 (emphasis added). The Court thus viewed the two requirements as mirror images of one another, connected through a single causal chain: The defendant's conduct must be the proximate cause of his contacts with the State, which in turn must be a proximate cause of the litigation. The relationship among the defendant, the forum, and the litigation requires a causal connection from start to finish.

### C. The Purposes Of Specific Jurisdiction Compel A Causal Requirement

A causal standard also serves the purposes of specific jurisdiction. The Court has identified three such purposes: to limit States to their proper roles in our federal system; to enable defendants to predict where they may be haled into court; and, ultimately, to satisfy "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316 (internal quotation marks omitted). Each of these rationales supports requiring a causal connection between contacts and claim, and each would be thwarted by a non-causal standard.

1. *Federalism.* The due process limitation on personal jurisdiction "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. The Framers "intended that the States retain * * * the sovereign power to try causes in their courts." *Id.* at 293. But "[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States." *Id.*

To keep each State within the "territorial limitations on [its] power," specific jurisdiction establishes

a principle of reciprocity. *Id.* at 294 (quoting *Hanson*, 357 U.S. at 251). When a defendant "purposefully avails itself of the privilege of conducting activities within the forum State," it "invok[es] the benefits and protections" of that State's laws. *Hanson*, 357 U.S. at 253. Those benefits in turn "give rise to obligations"; and a State may "enforce the obligations which" the defendant thereby "incurred." *International Shoe*, 326 U.S. at 319-320. As the *Nicastro* plurality summarized, a defendant "submits to the judicial power of an otherwise foreign sovereign to the extent"—and only to the extent—"that power is exercised in connection with the defendant's activities touching on the State." 564 U.S. at 881.

A causal test for the "arise out of or relate to" inquiry preserves this principle of reciprocity. It ensures that a State may hale a defendant into court to enforce those obligations that the defendant "incurred" by enjoying the privileges and benefits of the forum's laws. *International Shoe*, 326 U.S. at 320. Thus, International Shoe could be sued in Washington for obligations that it incurred by exercising the privilege of conducting sales and other business there. And Bristol-Myers, by the same token, may be sued in California for injuries that came about because it exercised the privilege of marketing, promoting, and selling Plavix in California.

A non-causal test, in contrast, would hopelessly confuse this reciprocity of privileges and obligations. It would allow a State to hale a defendant into court to enforce obligations that would have been "incurred" *regardless* of whether the defendant enjoyed the privileges and benefits of the forum's laws. In

this case, for instance, the California Supreme Court permitted respondents to sue Bristol-Myers in California on claims that arose because Bristol-Myers enjoyed the benefits of developing Plavix in New York or New Jersey, and of marketing and selling it in Ohio and Texas and elsewhere. At no point in that chain of events leading up to respondents' alleged injuries did Bristol-Myers exercise the privilege of doing business in California or enjoy the benefits of California's laws. Bristol-Myers thus did not "submit[] to the judicial power of" California with respect to those activities, *Nicastro*, 564 U.S. at 881 (plurality opinion), and California has no authority to "enforce the obligations" incurred by them, *International Shoe*, 326 U.S. at 320.

If it were otherwise, States could and regularly would "tread on the domain" of their "sister State[s]." *Nicastro*, 564 U.S. at 899 (Ginsburg, J., dissenting). National companies frequently engage in parallel conduct in multiple States—selling a product in one State, for example, that looks just the same as a product it sells in 5 or 10 or 49 others. If one State could exercise jurisdiction over conduct that takes place in another for no more reason than that, then the "territorial limitations on [state] power" would be eroded, and interstate conflict would be frequent. *World-Wide Volkswagen*, 444 U.S. at 294 (internal quotation marks omitted). A causal test prevents this outcome by cleanly allocating each State's authority, and ensuring that one sovereign does not reach out and adjudicate claims that properly belong to another.

2. *Predictability*. The Due Process Clause entitles potential defendants to "fair warning that a particu-

lar activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King*, 471 U.S. at 472 (internal quotation marks omitted). A second aim of the law of personal jurisdiction is thus to ensure "predictability." *World-Wide Volkswagen*, 444 U.S. at 297. This enables defendants to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," and to take actions to "alleviate the risk of burdensome litigation"—including by "procuring insurance, passing the expected costs on to customers," and, if necessary, "severing [their] connection with [a] State" altogether. *Id.*

A causal test provides prospective defendants the notice to which due process entitles them and is administrable by courts. It informs businesses that, upon purposefully setting foot in a State, they will be subject to jurisdiction there for any consequences of their actions. *See infra* pp. 37-46 (further arguing that defendants should be subject to jurisdiction only for the *foreseeable* consequences of their actions). Defendants may thus procure insurance for their actions in the State, and expand or limit their activities there with full knowledge as to the jurisdictional consequences. And courts likewise have a clear jurisdictional standard that "ensur[es] the 'orderly administration of the laws.'" *World-Wide Volkswagen*, 444 U.S. at 297; *see also Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) (noting that the Court has a preference for "[s]imple jurisdictional rules" that "promote greater predictability").

A non-causal test offers no similar clarity to defendants or courts. It does not limit a State's jurisdiction to the consequences of activities conducted in

the State. Nor does it provide any straightforward way of determining what out-of-state activity may serve as a predicate for jurisdiction. No company could predict what conduct will be deemed sufficiently "related" to its in-state conduct to give rise to jurisdiction. *See Maracich* v. *Spears*, 133 S. Ct. 2191, 2200 (2013) (explaining that gleaning meaningful guidance from the words "related to" is "a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else"). And defendants might as well throw up their hands in trying to guess how a court will apply a "sliding scale" that balances the "intensity" of a defendant's contacts against their "connection" with the litigation. Pet. App. 22a, 32a; *see also* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 235 (2014) (concluding that the "sliding scale" test fails to offer "predictive guidance").

Unpredictable, all-things-considered tests of this kind are undesirable in any jurisdictional context. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1574-1575 (2016); *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1133 (2015). But they are particularly harmful in the context of personal jurisdiction, where predictability is paramount. Knowing where one may be subject to suit matters a great deal. It determines what choice-of-law framework governs, *Day & Zimmerman, Inc.* v. *Challoner*, 423 U.S. 3 (1975) (per curiam), and which statute of limitations will apply, *Sun Oil Co.* v. *Wortman*, 486 U.S. 717 (1988). It affects matters as varied as the composition of the jury, the rules of discovery, and the law of fee-shifting. Allan R. Stein,

*Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. Chi. Legal F. 373, 385. Businesses—like all defendants—need to be able to anticipate such fundamental determinants of liability in order to make intelligent investment, insurance, and business decisions. A non-causal test robs prospective litigants of this predictability, and impairs the aims of specific jurisdiction doctrine as a result.

3. *Fairness.* Finally, the Court has often stressed that jurisdictional rules must accord with "traditional notions of fair play and substantial justice." *World-Wide Volkswagen*, 444 U.S. at 292 (quoting *International Shoe*, 320 U.S. at 316). Because the rules governing personal jurisdiction "give specific content" to these traditional notions, *Goodyear*, 564 U.S. at 923, the Court has often considered what is fair in delineating how far jurisdictional rules extend, *see, e.g.*, *Daimler*, 134 S. Ct. at 763; *Nicastro*, 564 U.S. at 880 (plurality opinion); *Burnham* v. *Superior Court*, 495 U.S. 604, 619, 621-622 (1990) (plurality opinion). And in every respect—for defendants, States, and plaintiffs—a causal test is fairer than the alternative.

First, compelling businesses and individuals to defend suits in a forum where *none* of the activities underlying the claims occurred would subject them to considerable, and unwarranted, litigation burdens. Defendants cannot easily procure critical evidence or interview relevant witnesses located in other States. If out-of-state witnesses refuse to testify at trial, courts typically lack the power to compel them to do so. *See, e.g.*, Cal. Civ. Proc. Code § 1989. And although defense attorneys can seek to depose out-of-state witnesses and present their deposition testi-

mony at trial, relying on depositions in this manner is notoriously ineffective. *See Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 511 (1947) (noting that "fix[ing] the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition[] * * * create[s] a condition not satisfactory to court, jury or most litigants"); GlaxoSmithKline Cert. *Amicus* Br. 11-12 (GSK Br.); Pharmaceutical Research and Manufacturers of America Cert. *Amicus* Br. 11-12.

Second, a State has little legitimate interest in adjudicating a dispute that has no causal connection with conduct that took place in or was directed at its territory. As noted above, the defendant in such a suit has not, by definition, incurred any obligations the State may reasonably seek to enforce. It is unlikely that the State's own residents are involved in such a suit. Surely other States—where the defendant conducted the relevant business, say, or the plaintiffs were injured—have a far greater interest in seeing the suit adjudicated.

Third, plaintiffs, too, lack any legitimate interest in bringing suit in a forum where none of the conduct underlying the claim occurred. If the plaintiff did not receive, use, or suffer injuries from a product in the forum, it is quite unlikely that State is the most convenient place for him to sue. Rather, the rationale for suing in a forum with no causal link to the plaintiff's claim is more likely tactical: an attempt, usually at the insistence of a plaintiff's attorney, to pick a forum perceived to be particularly plaintiff-friendly. *See* U.S. Chamber of Commerce Cert. *Amicus* Br. 18 (describing how "plaintiffs' counsel [in pharmaceutical cases] often seek to aggregate claims

from plaintiffs across the country in particular 'magnet jurisdictions'"); GSK Br. 3-4 (describing how plaintiffs' attorneys try to bring mass tort actions in States like Illinois and Missouri, where the jurisdictional and discovery rules are deemed to be plaintiff-friendly and juries tend to award larger verdicts); Pet. 32 (citing a survey of products liability suits filed in San Francisco County and Los Angeles, which found that 67 percent of the complaints did not have a California resident in the caption). Due process has no interest in encouraging forum shopping of this kind.

It makes no difference that a State may be adjudicating claims of a similar subject matter brought by its own residents. Litigation of such claims does not change the fact that for the non-resident plaintiffs—whose claims did not arise within the State, *see supra* note 1—the court will need to oversee the collection and presentation of trial evidence gathered from far-away forums, undertake a choice-of-law analysis with respect to each forum's laws, and potentially apply the laws of those other forums to all or parts of each non-resident plaintiff's claims. There are multiple ways to promote efficiency and judicial economy in mass tort litigation without sidelining specific jurisdiction principles, and without imposing these sorts of demands on trial courts. *See infra* pp. 50-52.

### D. The Sliding Scale Approach Impermissibly Dispenses With A Causal Link, Blurring The Line Between General And Specific Jurisdiction

Notwithstanding the critical importance this Court's precedents assign to identifying a causal link

between the defendant's forum contacts and the plaintiff's claim, the California Supreme Court has adopted a test that deems the existence of such a link optional. But the court adduced no valid reason for dispensing with this fundamental requirement for establishing specific jurisdiction. And its decision to do so blurs specific jurisdiction with general—an approach flatly foreclosed by this Court's precedent.

The California court calls its test a "sliding scale." Pet. App. 32a. As the court has explained, it approaches the question whether the requisite link between the forum and the litigation exists by treating "the intensity of [a defendant's] forum contacts" and "the connection of the [plaintiff's] claim to those contacts" as "inversely related." *Id.* at 22a (internal quotation marks omitted). If a defendant's forum contacts are sufficiently "wide ranging," then the plaintiff's claim "need not arise directly from" those contacts at all; indeed, "the defendant's activities in the forum state need not be either the proximate cause or the 'but for' cause of the plaintiff's injuries." *Id.* (internal quotation marks omitted). Here, that meant that because Bristol-Myers's contacts with California were "extensive"—*i.e.*, it marketed and sold Plavix to other people and researched other drugs there—Bristol-Myers could, in the California Supreme Court's view, be subjected to specific jurisdiction "based on a less direct connection between [its] forum activities and plaintiffs' claims than might otherwise be required." *Id.* at 32a.

That cannot be. Courts cannot compensate for the lack of a causal link between the forum and the litigation by pointing to a stronger link between the defendant and the forum. *Each* component of "the

relationship among the defendant, the forum, and the litigation" is essential in establishing "case-linked" jurisdiction. *Walden*, 134 S. Ct. at 1121 & n.6 (internal quotation marks omitted). That is what distinguishes specific jurisdiction from general: The very definition of general jurisdiction is that it enables courts to assert all-purpose jurisdiction over claims with no cognizable relationship to the defendant's in-state conduct, based on the defendant's conduct in the State being sufficiently "intens[e]." Pet. App. 22a (internal quotation marks omitted). By borrowing that same approach to determining whether *specific* jurisdiction is present, California has collapsed the two categories into "a sort of jurisdictional stew." *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 321 (3d Cir. 2007) (internal quotation marks omitted).

*Goodyear* makes clear that such a move is impermissible. In that case, several individuals sued a foreign company in North Carolina after allegedly defective tires caused a bus accident in France. 564 U.S. at 918. Although the tires were manufactured and sold abroad, and the accident occurred abroad, the North Carolina Court of Appeals purported to exercise general jurisdiction over the defendant because the defendant also sold tires into North Carolina through "the stream of commerce." *Id.* at 919-920. This Court unanimously reversed. "The North Carolina court's stream-of-commerce analysis," it explained, "elided the essential difference between case-specific and all-purpose (general) jurisdiction." *Id.* at 927. "Flow of a manufacturer's products into the forum * * * may bolster an affiliation germane to *specific* jurisdiction." *Id.* But unless the defendant's forum activity is so continuous and

systematic as to render the company "at home," *id.* at 929, it is "not enough to support the demand that the corporation be amenable to suits *unrelated* to that activity," *id.* at 927 (emphasis added) (internal quotation marks omitted). By "[c]onfusing or blending general and specific jurisdictional inquiries," the Court held, North Carolina had offered an "inadequate basis for the exercise" of jurisdiction. *Id.* at 919-920.

California's highest court, like North Carolina's, has "[c]onfus[ed]" and "blend[ed]" the jurisdictional inquiries. Its sliding scale test decides whether a defendant is subject to specific jurisdiction on a plaintiff's claim by weighing "the *intensity* of [the defendant's] forum contacts" (a consideration relevant to general jurisdiction) against "the *connection* of the claim to those contacts" (a consideration relevant to specific jurisdiction). Pet. App. 22a. By borrowing an "affiliation germane to" one form of jurisdiction and using it to "bolster" the other, California has "elided the essential difference" between these two tests. *Goodyear*, 564 U.S. at 927.

Indeed, the sliding scale goes further than that: It contravenes this Court's express, recent guidance as to when specific jurisdiction is inappropriate. In *Daimler*, the Court explained that "if a [car] accident took place in Poland and injured Polish plaintiffs sued [the car manufacturer] in California court, the question would be one of general jurisdiction." 134 S. Ct. at 754 n.5. But under the sliding scale, California courts could exercise *specific* jurisdiction in that circumstance if the defendant's contacts with California were "substantial" and it "enjoyed sizable revenues [there] from the sales of *** the very

product" that caused the injury. Pet. App. 32a. Likewise, in *Goodyear*, the Court crisply held that "[b]ecause the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy." 564 U.S. at 919. Not so under the sliding scale: If the defendant sold similar tires in North Carolina, and otherwise had "wide ranging" contacts there, then North Carolina *would* have specific jurisdiction. Pet. App. 22a (internal quotation marks omitted).[5]

Denying that the sliding scale blurs specific and general jurisdiction, the California Supreme Court insisted that it was not subjecting Bristol-Myers to *all* possible claims in California. *Id.* at 34a-35a. But the sliding scale results in Bristol-Myers being subject to specific jurisdiction in California on all defect claims for any of its products sold nationally. It also means that Bristol-Myers would be subject to specific jurisdiction in California on a disgruntled Maine employee's wrongful termination claim, if the employee alleged that Bristol-Myers also employed workers in California and had a uniform human-resources policy. *See id.* at 77a (dissent proposing a similar hypothetical). So too a Bristol-Myers land-

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[5] Respondents' argument that *Goodyear* and *Daimler*'s statements were "passing dictum," Br. in Opp. 14-16, is simply wrong. *Goodyear* squarely held that the "North Carolina courts lacked specific jurisdiction to adjudicate" the plaintiffs' product-liability claims. 564 U.S. at 919. And *Daimler* identified the Polish product-liability hypothetical as "illustrat[ing] the respective provinces of general and specific jurisdiction." 134 S. Ct. at 754 n.5.

lord in Nebraska could sue in California for back rent by alleging that Bristol-Myers also leased facilities in California and used a centralized Bristol-Myers accounts-payable system. *See id.* The sliding scale is thus so close to general jurisdiction as to be functionally indistinguishable for national consumer companies like Bristol-Myers. *See id.*

The California Supreme Court cannot flout the Court's precedents in this manner. Like all courts, it is obliged to follow the straightforward inquiry this Court has prescribed since *International Shoe*: Specific jurisdiction is proper if the plaintiff's claim "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Daimler*, 134 S. Ct. at 754 (quoting *Helicopteros*, 466 U.S. at 414 n.8). Contrary to the decision below, that requirement does not expand and contract from case to case. Rather, as this Court has made clear for decades, it means that for specific jurisdiction to exist, there must be *some* causal connection between the defendant's forum contacts and the plaintiff's suit.

## II. SPECIFIC JURISDICTION REQUIRES THAT A DEFENDANT'S FORUM CONTACTS BE A PROXIMATE CAUSE OF THE PLAINTIFF'S CLAIM

Given that the relationship between the forum and the litigation requires some causal connection, the question is whether it requires causation of a particular kind. As the petition for certiorari pointed out, lower courts are divided over whether but-for causation or proximate causation should be the standard. *See* Pet. 11-14. To resolve that split, this Court should hold that the defendant's forum contacts must be a *proximate* cause of the litigation. That is, the

defendant's forum contacts must bear a direct relation to the litigation and be of such a nature that the defendant could reasonably foresee being sued in the forum on the plaintiff's claims. *See Paroline* v. *United States*, 134 S. Ct. 1710, 1719 (2014) (describing proximate cause in terms of "direct[ness]" and "foreseeability"). Indeed, the same authorities and considerations that establish that there must be *some* causal connection also establish that the standard should be *proximate* causation.

1. A proximate causation requirement comes straight from this Court's decision in *Burger King*. There, the Court addressed the necessary relationship among the defendant, the forum, and the litigation for purposes of specific jurisdiction. 471 U.S. at 473-474. And it stated that "where individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise *proximately* from such activities." *Id.* (emphasis added) (internal quotation marks and citation omitted). *Burger King* thus described the requisite link between a defendant's forum contacts and the litigation in terms of proximate cause. *See Beydoun* v. *Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2014) (locating a proximate cause requirement in *Burger King*); *Bank Brussels Lambert* v. *Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 128 (2d Cir. 2002) (same). The Court then proceeded to invoke the concept of "foreseeability," *Burger King*, 471 U.S. at 474—a concept closely associated with proximate cause. *See Paroline*, 134 S. Ct. at 1719 ("Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct."). As the Court

explained, "the defendant's conduct and connection with the forum State" must be such that the defendant "should *reasonably anticipate* being haled into court" on the plaintiff's claims. *Burger King*, 471 U.S. at 474 (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

Consistent with a proximate causation requirement, specific jurisdiction did *not* exist in *Kulko*, where the defendant's forum contacts were merely a but-for cause of the litigation. The plaintiff in that case brought an action in California against the defendant (a New York resident), seeking to modify their marital separation agreement and increase the defendant's child-support obligations. 436 U.S. at 86-88. The couple had married years earlier during a three-day stopover in California, but they had never resided there together, and their separation agreement was drawn up in New York. *Id.* at 86-87. The Court held that the California court lacked specific jurisdiction over the defendant. *Id.* at 90. The defendant's prior contact with the forum State—getting married there—was a but-for cause of the plaintiff's suit: Had there been no marriage, there would have been no separation agreement to seek to modify. But whatever but-for causal connection it may have had, the fact of the parties' California marriage, "by itself," could not support the California court's exercise of specific jurisdiction. *Id.* at 93.

*Rush* v. *Savchuk*, 444 U.S. 320 (1980), arguably involved a but-for causal link as well, and the Court likewise held that specific jurisdiction over the defendant was lacking. The question there was whether a Minnesota court could exercise specific jurisdiction over an Indiana resident in a negligence

action for damages following a car accident in Indiana. *Id.* at 322-324. The defendant's insurance company did business in Minnesota, and his policy obligated the insurer to indemnify the defendant for liability claims nationwide. In a legal sense, the indemnification "debt" his insurer owed him was "present" in Minnesota, *id.* at 328, and but for having purchased the insurance policy, the defendant might not have been driving and in the accident. *See World-Wide Volkswagen*, 444 U.S. at 304 (Brennan, J., dissenting) (noting that insurance is frequently a prerequisite to driving on public roads); Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444, 1463 (1988) (similar). But the Court did not deem this a "significant" enough connection between the forum and the litigation to support the assertion of specific jurisdiction. *Rush*, 444 U.S. at 329. The insurance policy was "not the subject matter of the case, * * * nor [was] it related to the operative facts of the negligence action." *Id.* It may have been part of the causal chain leading up to the accident and then the plaintiff's suit, but its "presence" in Minnesota had no "jurisdictional significance" for the Court—a conclusion in keeping with the notion that a but-for causal connection is not enough. *Id.* at 329-330.

2. Requiring that the defendant's forum contacts be a proximate cause of the litigation also harmonizes the two links in the specific jurisdiction relationship.

In a number of cases, this Court has analyzed what is required to establish the *first* link in the specific jurisdiction relationship—the link between the defendant and the forum. In discussing what satis-

fies the purposeful availment requirement, the Court has long held that the only forum contacts that count are those that "proximately result" from the defendant's actions. *Burger King*, 471 U.S. at 475. A defendant's actions might be the source of many contacts in the forum. But those contacts that are merely a "random, fortuitous, or attenuated" consequence of the defendant's actions cannot satisfy the purposeful availment requirement. *Id.* (internal quotation marks omitted); *see also Walden*, 134 S. Ct. at 1123 (same). The relationship between the defendant and the forum must be one of proximate causation: The defendant himself must proximately cause the contacts in question.

*World-Wide Volkswagen* illustrates the point. There, two New York residents purchased an Audi from a car dealer in New York. While on their way to Arizona, they got into a car accident in Oklahoma, and sued the dealer and its wholesaler in Oklahoma state court. 444 U.S. at 288. This Court held that the defendants could not be sued there. *Id.* at 295. The defendants' only connection with Oklahoma was "the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." *Id.* And such a circumstance—attributable to the "unilateral activity" of the purchasers, rather than to the defendants' conduct—could not justify the exercise of specific jurisdiction. *Id.* at 298 (quoting *Hanson*, 357 U.S. at 253); *see also id.* at 298-299 (holding that even if "the purchase of automobiles in New York * * * would not occur *but for* the fact that the automobiles are capable of use in distant States like Oklahoma," that was "far too

attenuated a contact to justify" Oklahoma's exercise of personal jurisdiction over the defendants).

The same standard used to assess whether there is a constitutionally sufficient link between the defendant and the forum should also govern whether there is a constitutionally sufficient link between the forum and the litigation. Just as the former turns on proximate cause, so too should the latter: Specific jurisdiction should require that the litigation proximately result from the defendant's forum contacts. After all, a defendant should be able to "reasonably anticipate being haled into court" to defend against the plaintiff's claims in an out-of-state jurisdiction. *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). And unless *both* links are bounded by principles of proximate cause, a defendant could find himself litigating claims in an out-of-state forum that are merely the "random, fortuitous, or attenuated" consequence of his contacts with the forum. *Id.* at 475 (internal quotation marks omitted). Imposing a proximate cause requirement on both links of the specific jurisdiction relationship would ensure that there is nothing "random" about being sued in a particular jurisdiction: Just as defendants would know that the only forum contacts that count are those that proximately result from their actions, they would know that the only suits that could be brought are those that proximately result from their contacts.

3. Defining "arise out of or relate to" in terms of proximate cause also promotes the principles that underlie specific jurisdiction—federalism, predictability, and fairness.

As to federalism, a proximate cause standard ensures that States do not "assert jurisdiction in an inappropriate case" by foreclosing jurisdiction when the defendant's forum contacts bear only an attenuated connection to the litigation. *Nicastro*, 564 U.S. at 884 (plurality opinion). "In a philosophical sense, * * * the causes of an event go back to the dawn of human events, and beyond." *Holmes* v. *Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 266 n.10 (1992) (internal quotation marks omitted). Proximate causation cuts off the causal chain at a point where a cause is "too remote." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). In the personal jurisdiction context, that would be where a defendant's forum contacts lack a "direct relation" to the plaintiff's suit. *Holmes*, 503 U.S. at 268. This aligns with personal jurisdiction's federalism rationale: If the "obligations" incurred in a State bear only an attenuated connection to the suit, the State's sovereign interest in exercising adjudicatory authority is diminished. *Compare McGee*, 355 U.S. at 223 ("suit was based on a contract" that was solicited in California, "delivered in California," and entered into with "a resident of that State," and so "California has a manifest interest" in holding the insurer "legally accountable" for refusing to pay claims), *and International Shoe*, 326 U.S. at 319-320 (States have an interest in enforcing "obligations" that "ar[i]se out of those very activities" conducted in the forum), *with Hanson*, 357 U.S. at 252 (State lacked a meaningful interest because "this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida"), *and Kulko*, 436 U.S. at 97, 99-101 (California was not the "proper forum for adjudication" when suit "involve[d] an agreement

that was entered into with virtually no connection with the forum State").

As to predictability, a proximate cause standard would foreclose specific jurisdiction when the plaintiff's suit was not a foreseeable consequence of the defendant's in-forum contacts. A defendant would be "answerable" for "the natural, ordinary and reasonable consequences" of his in-state conduct, *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 470 (2006) (internal quotation marks omitted), but not for "every conceivable harm that can be traced" to those forum contacts, *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983). This would enable defendants to "reasonably anticipate," from their own "conduct and connection with the forum State," when they might be "haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. And it would allow them to "structure their primary conduct with some minimum assurance" as to the jurisdictional consequences. *Id.*

Proximate cause further promotes predictability because it is an administrable rule that draws on an "extensive body" of existing law. *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 839 (1996); *accord Hertz*, 559 U.S. at 94. "Both judges and litigants are familiar with" the concept of proximate cause, and they can consult the large "existing body of precedent" "whenever borderline cases crop up." *Merrill Lynch*, 136 S. Ct. at 1574-1575. Adopting a proximate cause standard would provide defendants an established guide for their conduct together with a body of case law applying that standard.

Finally, and for similar reasons, proximate cause promotes fairness. By requiring that the plaintiff's

suit be a direct and foreseeable result of the defendant's forum contacts, proximate cause ensures that jurisdiction is consistent with "fair play and substantial justice." *International Shoe*, 326 U.S. at 320. The burden on the defendant would not be "undue," given his in-state contacts; the plaintiff's need for an "effective" forum would be met, given the close relationship between the forum and the litigation; and the "interest[s] of the several States" would be respected, because the State hearing the suit would have a prevailing interest in it. *World-Wide Volkswagen*, 444 U.S. at 292.

By contrast, a but-for-only approach would allow specific jurisdiction to be asserted based on contacts that, although somewhere in the causal chain, have only the loosest connection to the cause of action. Take a couple of examples. Suppose a motorist traveling from New York to Massachusetts hits a pedestrian in Massachusetts, and the pedestrian sues in Connecticut on the theory that but for the motorist's use of Connecticut's roads, he never would have arrived in Massachusetts. Or suppose a lawyer commits malpractice in Virginia, and the client sues in Massachusetts, arguing that if the lawyer had not gone to law school in Cambridge, he never would have become an attorney. Under a but-for-only approach, the "arise out of or relate to" requirement would be satisfied in each of these cases, even though the defendant's contacts with the forum have only the most attenuated connection with the plaintiff's claims. *See* Brilmayer, *supra*, at 1445.

Many courts have accordingly recognized that such a capacious view of what establishes the necessary link between the forum and the litigation has "no

limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." *Nowak* v. *Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996); *see also uBID, Inc.* v. *GoDaddy Grp., Inc.*, 623 F.3d 421, 430 (7th Cir. 2010) (but-for causation by itself is "vastly overinclusive"). When faced with cases presenting such attenuated connections, courts have rightly found that but-for causation would cast too wide a net. *See, e.g.*, *Beydoun*, 768 F.3d at 507-508 (rejecting plaintiff's argument for specific jurisdiction in Michigan over his former employer, a Qatari company, when he said that "but for" the company's solicitation of him in Michigan, he never would have been employed there and experienced grievances in Qatar); *Harlow* v. *Children's Hosp.*, 432 F.3d 50, 53-63 (1st Cir. 2005) (rejecting plaintiff's argument for specific jurisdiction in Maine over Boston Children's Hospital on the theory that but for the hospital's sending of informational packets to pediatricians in Maine, she never would have been referred for treatment there and experienced injuries). As these cases demonstrate, a standard requiring something less than proximate cause stretches personal jurisdiction too far, untethering it from its underlying principles.

## III. THERE IS NO CAUSAL CONNECTION BETWEEN BRISTOL-MYERS'S CALIFORNIA CONTACTS AND RESPONDENTS' CLAIMS IN THIS CASE

Under any causation standard—but-for or proximate—the California Supreme Court's decision should be reversed. A California court may not assert specific jurisdiction over Bristol-Myers on respondents' claims.

1. Respondents do not dispute that their claims would be exactly the same if Bristol-Myers had no contacts with California at all. *See* Pet. App. 29a. That fact alone is dispositive. It means that there is no causal link between Bristol-Myers's California contacts and respondents' claims. Accordingly, those claims did not arise out of or relate to Bristol-Myers's California contacts.

To appreciate the absence of any causal link, just trace the alleged chain of causation from Bristol-Myers to any of respondents' asserted injuries. The chain starts in New York or New Jersey, where Bristol-Myers performed or directed the development, manufacture, labeling, and marketing of Plavix. J.A. 85. Those were also the States where Bristol-Myers worked on obtaining regulatory approval for the drug. *Id.* The chain of causation leads from New York or New Jersey to where Plavix was prescribed, dispensed, or ingested by a respondent—say, Ohio or Texas (or one of the dozens of other States where respondents reside). Pet. App. 2a-3a; J.A. 25-41. And the chain ends where the respondent allegedly suffered injury—again, Ohio or Texas (or the other States where they live). Pet. App. 4a, 33a-34a. Thus, the chain of causation running from Bristol-Myers to respondents' alleged injuries never passes through California. And given the lack of any causal link between anything that happened in California and respondents' claims, the Due Process Clause prohibits a California court from asserting specific jurisdiction.

2. In reaching a contrary conclusion, the California Supreme Court pointed to two sets of activities conducted by Bristol-Myers in California—its mar-

keting and selling of Plavix to *other* individuals (*i.e.*, not respondents), and its research and development of *other* products (*i.e.*, not Plavix). *Id.* at 28a-29a. Not even the California Supreme Court, however, was able to identify any causal link between those activities and respondents' claims. That is because none exists.

Bristol-Myers may have marketed, promoted, and sold Plavix as part of a "nationwide course of conduct directed out of [its] New York headquarters and New Jersey operations center." *Id.* at 29a-30a. And Bristol-Myers may have "implemented" that "nationwide" strategy in various States across the country—including California, Ohio, and Texas. *Id.* But the fact remains that nothing that Bristol-Myers did *in California* bears any causal relationship to respondents' claims; indeed, if Bristol-Myers had never marketed, promoted, or sold a single tablet of Plavix in California, respondents' alleged injuries would be 100 percent the same. Respondents' claims arise instead out of what Bristol-Myers allegedly did *in other States*. An allegation that Bristol-Myers's actions in other States were part of a "nationwide course of conduct" might suggest that they were *similar* or *parallel* to its actions in California. *Id.* But it does not establish that Bristol-Myers's contacts with California *caused* respondents' injuries. *Cf. Rush*, 444 U.S. at 330 (finding no "contact" of "jurisdictional significance" in Minnesota, despite the fact that the defendant did business in "all 50 States and the District of Columbia").

Bristol-Myers's research and development of *other* drugs in California also bears no causal link to respondents' claims. Indeed, even the California

Supreme Court accepted that respondents' "claims do not arise out of [Bristol-Myers's] research conduct in this state." Pet. App. 29a. It is undisputed, after all, that the research and development of Plavix took place in New York and New Jersey. *Id.* at 5a; J.A. 85.

3. Respondents suggest that none of this matters because the California court can exercise specific jurisdiction over (1) respondents' claims against a *different* defendant and (2) claims against Bristol-Myers brought by *different* plaintiffs. Br. in Opp. 9-10, 13-14. Thus, according to respondents, it would be "efficient[]" and not "unduly burden[some]" to force Bristol-Myers to defend against respondents' claims in the same litigation. *Id.* at 10, 14.

But the fact that the court has personal jurisdiction over a different defendant—McKesson—is simply irrelevant. This Court has held that it is "plainly unconstitutional" for a court to "assert[] jurisdiction over [one defendant] based solely on the activities of [another defendant]." *Rush*, 444 U.S. at 332. Specific jurisdiction must rest on contacts with the forum created by the "defendant *himself*." *Walden*, 134 S. Ct. at 1122 (quoting *Burger King*, 471 U.S. at 475). "The requirements of *International Shoe* * * * must be met as to *each* defendant over whom a state court exercises jurisdiction." *Rush*, 444 U.S. at 332 (emphasis added).

Nor does the presence of other plaintiffs, asserting their own individual claims, make any difference. This Court has held that specific jurisdiction cannot be based on a plaintiff's "unilateral" decisions, such as a decision to travel or move to a State. *Walden*, 134 S. Ct. at 1122 (internal quotation marks omit-

ted). A plaintiff's "unilateral" decision to file suit in a State alongside other plaintiffs is no exception. If it were otherwise, a defendant could be haled into state court to defend against thousands of claims brought by thousands of plaintiffs, so long as just one of those claims arose out of the defendant's forum contacts. That can hardly be described as due process.

In any event, if respondents were truly interested in efficiency and judicial economy, it was well within their power to achieve those objectives without undermining principles of personal jurisdiction. For instance, respondents could have filed their exact same complaints against Bristol-Myers in New York or Delaware, where Bristol-Myers is subject to general jurisdiction. Numerous plaintiffs have done just that. *See, e.g.*, Administrative Order, First Judicial District, N.Y. Supreme Court (Feb. 1, 2012) (coordinating more than 40 Plavix lawsuits filed in New York state courts during the prior year before one New York state court judge).[6] Alternatively, respondents could have filed their claims in New York or New Jersey, where Bristol-Myers performed or directed the development of the drug and its marketing strategy. J.A. 85. Or the 92 respondents from Texas could have filed a complaint against Bristol-Myers in Texas state court; the 71 respondents from Ohio could have done the same in Ohio; and so on. Pet. App. 3a.[7]

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[6] *Available at* http://www.nycourts.gov/courts/1jd/supctmanh/AO%20Plavix%202-12.pdf.

[7] None of this is to say that a plaintiff's residence or injury in the forum State is, by itself, sufficient to establish specific

Respondents also could have sued Bristol-Myers in federal court in the States just mentioned, and participated in the process that Congress designed to handle disputes of this kind: federal multi-district litigation (MDL). In a federal MDL, "civil actions involving one or more common questions of fact" in different districts "may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). Common questions are addressed together at the pretrial stage, while individualized factual questions—like who prescribed each plaintiff Plavix and how the drug was marketed to that physician—are "remanded" for trial to the districts from which the actions were transferred. *Id.* This procedure has been used successfully countless times before. In fact, a federal MDL involving materially identical Plavix claims has been proceeding in the District of New Jersey since 2013. *See In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.*, 923 F. Supp. 2d 1376 (J.P.M.L. 2013).

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jurisdiction. *See supra* note 1. With respect to the purposeful availment requirement, this Court has held that "mere injury to a forum resident is not a sufficient connection to the forum," and that "an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State." *Walden*, 134 S. Ct. at 1125. And courts have held that even where a product injures a plaintiff in the forum, there is no specific jurisdiction over the product's manufacturer if the product entered the State through channels outside the manufacturer's control. *See, e.g.*, *D'Jamoos* v. *Pilatus Aircraft Ltd.*, 566 F.3d 94, 106 (3d Cir. 2009); *Kuenzle* v. *HTM Sport-Und Freizeitgeräte AG*, 102 F.3d 453, 457 (10th Cir. 1996); *Hinrichs* v. *Gen. Motors of Can., Ltd.*, No. 1140711, 2016 WL 3461177, at *27 (Ala. June 24, 2016) (per curiam), *petition for cert. filed*, No. 16-789 (Dec. 19, 2016).

For reasons of their own, respondents decided not to do any of these things. Instead, they filed their complaints in California, seeking to leverage Bristol-Myers's in-state contacts involving *other* plaintiffs and *other* products into a heretofore unheard-of form of specific jurisdiction. This Court held decades ago that the Due Process Clause prohibits assertions of specific jurisdiction "unconnected with [a defendant's] activities" in the forum State. *International Shoe*, 326 U.S. at 317. Applying that principle here, the Court should hold that Bristol-Myers cannot be subjected to specific jurisdiction in California on respondents' claims.

## CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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MARCH 2017

RECORD AND BRIEF

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No. 16-466

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO *et al.*,

*Respondent.*

On Writ of Certiorari
to the California Supreme Court

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## QUESTION PRESENTED

Does the Due Process Clause categorically forbid a state from providing a forum for litigation against a non-resident defendant brought by resident and non-resident plaintiffs who assert identical claims arising from the defendant's uniform conduct?

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## INTRODUCTION

This case presents the recurring question of when the Due Process Clause forbids a state court from providing a forum to adjudicate claims against a non-resident. The context here is litigation against a defendant that engaged in a uniform, nationwide course of conduct—conduct that, predictably, caused its alleged harms in several states. In other words, the defendant is alleged to have done *one* wrong thing (or set of wrong things), and to have directed that common conduct at individuals in different forums around the country in violation of the same legal standards. In such cases, residents of multiple states regularly bring suit together to resolve all their claims efficiently. The state courts have long adjudicated such claims without controversy. Petitioner's argument is that this practice has actually always been unconstitutional, although no one ever realized it. According to petitioner, no out-of-state plaintiff can join a California case properly brought against it by California plaintiffs—no matter how *related* their claims may be—unless petitioner's contacts with California themselves caused that particular plaintiff's injury.

In this case, petitioner developed the prescription drug Plavix, which it distributed and sold through a uniform, nationwide campaign. Consumers of Plavix from multiple states allege that same conduct injured them in the same way. They joined together to pursue their identical claims in combined cases brought in California state court.

As petitioner acknowledges, the "complaints are materially identical," Br. 4 n.1, drawing no distinction between the residents and non-residents in two key respects. *See* J.A. 20-74. [1] First, petitioner's claims concern the same underlying conduct, so they all rest on one set of operative facts. Second, although the plaintiffs' claims may formally be governed by different states' laws, the relevant legal standards are the same.

California, moreover, will not materially increase the litigation burden on petitioner by providing a forum for all the claims; indeed, the reverse is true. Petitioner inevitably will appear in the forum as a defendant (on the residents' claims), Pet. App. 92a, 95a n.2, and will therefore provide all the same fact discovery regarding its uniform nationwide marketing, manufacturing, and distribution of Plavix, while developing and pressing all the same legal arguments in its defense.

Litigating the cases together will also be far more efficient for the judiciary. That is so because the California courts already have jurisdiction to adjudicate claims brought by the resident *and* non-resident plaintiffs respecting the same core issues of fact and law. Because petitioner's co-defendant McKesson—which distributed Plavix nationally—is subject to general jurisdiction in California, the

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[1] Like petitioner (at 4 n.1), respondents use "residency" as a shorthand for the location where the plaintiff was injured.

California courts will adjudicate even the *non*-residents' identical claims with respect to at least McKesson. In these circumstances, the most efficient means to resolve these cases, *by far*, is together in a common forum.

On petitioner's view, however, the Due Process Clause somehow prohibits the states from providing that common forum for the joint adjudication of identical, multi-state claims against an out-of-state defendant's conduct. Even where, as here, (i) the forum's exercise of jurisdiction is completely fair and reasonable, (ii) the State has substantial interests in entering a complete judgment regarding the defendant's conduct and in collaborating with its sister states to provide for the efficient resolution of identical claims, and (iii) centralizing the litigation substantially furthers the interests of the judiciary generally, the State must exclude the intimately related claims of non-resident plaintiffs under petitioner's bright-line "causation" test.

Such a tortuous and illogical procedural rule would be a surprising result for the *Due Process* Clause. Accordingly, this Court's precedents unsurprisingly reject petitioner's sweeping, ahistorical, and atextual reading of the Fourteenth Amendment. Once a defendant's operative conduct is properly subject to the specific jurisdiction of a court in a given case, nothing in the Constitution or our "traditional notions of fair play and substantial justice" can be read to categorically displace the State's authority to adjudicate the legality of that conduct, in that case, for both residents and non-residents alike. In fact, these kinds of complex,

multi-party cases have been common in state courts for decades, have been validated in on-point precedents of this Court, and rest on doctrines essential to making complex civil litigation possible and efficient in both the state and federal courts. Conversely, it is hard to even estimate how much damage petitioner's brand-new, bright-line rule would cause, because it is so contrary to accepted analysis *and* the assumptions under which this Court has substantially changed the law of corporate general jurisdiction in recent years. This Court should affirm.

## STATEMENT

### I. Background

This case involves product liability suits brought jointly in California state court by plaintiffs who were injured—many in California, others elsewhere—by a uniform, nationwide scheme for the manufacture, marketing, and distribution of Plavix. Petitioner Bristol-Myers Squibb (BMS) manufactures, markets, and sells Plavix throughout the United States. Pet. App. 2a-3a. Plavix limits blood clotting, ostensibly minimizing the occurrence of clot-related problems like heart attacks and strokes. But although petitioner's nationwide marketing push promoted Plavix as "providing greater cardiovascular benefits, while being safer and easier on a person's stomach than aspirin," patients in fact risked serious side effects, such as "heart attack, stroke, internal bleeding, blood disorder[s] or death," with little-to-no marginal benefit. *Id.* 3a-4a.

Petitioner is incorporated in Delaware and headquartered in New York. *Id.* 4a-5a. But it also has substantial operations in California, including five offices that employ approximately 160 people and perform drug research and development. *Id.* Petitioner employs approximately 250 sales representatives in California, has a government advocacy office in Sacramento, has been registered with the California Secretary of State to conduct business there since 1936, and maintains a registered agent for service of process. *Id.*

Petitioner does not distribute Plavix alone. Rather, it contracted to give a substantial role in the national distribution of Plavix to McKesson Corporation (McKesson), which has its principal place of business in California. *Id.* 4a-5a; 133a n.18. By its own description, "McKesson is the central nervous system of health care," https://goo.gl/eK1DAo, and its pharmaceutical distribution business "supplies branded, generic and over-the-counter pharmaceuticals to more than 40,000 customers spanning retail chains, independent retail pharmacies and institutional providers," https://goo.gl/RHSSUY. During the relevant period, approximately 25% of petitioner's *global* gross revenue was attributable to McKesson-related sales. *See, e.g.*, Bristol Myers Squibb Co., Form 10-K (Feb. 17, 2012).

Petitioner conducted an ambitious, nationwide, direct-to-consumer marketing campaign for Plavix, touting its benefits for various diseases. Pet. App. 28a, 95a. That marketing was not location-specific; it circulated the same materials throughout the United

States. *Id.* 27a-28a. And it was a massive success. Plavix was either the highest or second-highest revenue drug in the nation from 2008-2011. [2] Petitioner sold over 180 million Plavix pills in California alone from 2006-2012, generating sales revenue of $918 million. *Id.* 4a-5a.

## II. Procedural History

1. In multiple complaints filed in California's Superior Court, a total of 86 California residents and 592 non-residents sued petitioner and McKesson for Plavix-related injuries. *Id.* 2a-4a. The complaints allege the same operative facts and legal claims without regard to the plaintiffs' residency—as petitioner concedes, all their "complaints are materially identical," Br. 4 n.1, and assert identical causes of action (mostly, common-law torts). Pet. App. 2a-4a. These uniform claims all derive from petitioner's common, nationwide conduct related to the design, development, manufacture, testing, marketing, and labeling of Plavix throughout the United States. *Id.*[3]

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[2] *See Top Medicines by Non-Discounted Spending (U.S.)*, IMS HEALTH (approximately $14 billion in U.S. Plavix sales between 2008 and 2012), http://www.imshealth.com/files/-web/Corporate/News/Top-Line%-20Market%20Data/US_Top_Meds_Non-Discounted_Spending_2012.pdf.

[3] Contrary to petitioner's suggestion (at 5), the bulk of the complaints' causes of action are *not* California statutory claims. The complaints do contain a few claims that cite the California

Petitioner removed the litigation to federal court on two grounds. First, it argued that there was diversity jurisdiction because McKesson had been fraudulently joined. The district court rejected that argument, finding that (contrary to petitioner's suggestion, which it repeats here, Br. 6), the plaintiffs had adequately "alleged that their damages arose from their use of Plavix distributed by McKesson." *Caouette v. Bristol-Myers Squibb*, No. 12-1814, at 8 (N.D. Cal. Aug. 10, 2012) (ECF No. 35).

Second, petitioner argued that the plaintiffs' separate complaints were properly viewed as one aggregate action. On that view, although no individual complaint was subject to removal under the Class Action Fairness Act (CAFA)—because each involved fewer than 100 total plaintiffs—they together would cross that numerical threshold for a CAFA "mass action." The core of petitioner's argument was that "the Court should aggregate the cases because the plaintiffs ... *have essentially brought the same case*." *Id.* at 11 (emphasis added). The district court did not doubt that premise, but found it legally insufficient to support removal under CAFA's plain text, which provides that "'the term 'mass action' shall not include any civil action in which ... the claims are joined upon motion of a

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code, but these theories merely duplicate the predominant and nearly identical common-law claims. *See* J.A. 47-72.

defendant.'" *Id.* at 11-12 (quoting 28 U.S.C. §1332(d)(11)(B)(ii)(II)).

Upon remand, the actions were coordinated together as a single body of litigation in San Francisco. Petitioner then moved to quash service on the claims of the non-resident plaintiffs (respondents here). Petitioner argued that respondents had failed to establish personal jurisdiction because they did not allege that they purchased or ingested Plavix in California. Pet. App. 1a-2a.

The Superior Court disagreed, concluding that petitioner's extensive California activities sufficed to create general jurisdiction. *Id.* 5a-6a. Petitioner then petitioned the Court of Appeal for a writ of mandate. There, petitioner admitted its hope that, if jurisdiction were defeated, "a lot of those cases aren't going to get filed." Oral Argument at 23:00, *Bristol-Myers Squibb Co. v. Superior Ct.*, 175 Cal. Rptr. 3d 412 (Cal. App. 2014). As the court put it, petitioner's counsel "candidly acknowledged that if each of the [plaintiffs] is required to refile in his or her home state ... fewer cases will be filed against BMS." Pet. App. 139a n.20. Noting that "BMS's due process rights do not include discouraging plaintiffs who may or may not have meritorious claims from pursuing them in an appropriate forum," the court ultimately held that California had specific personal jurisdiction

over petitioner with respect to the non-residents' claims. *Id.* 114a-44a.[4]

2. The Supreme Court of California affirmed. *Id.* 44a-45a. Though cases of similar scale had previously proceeded under general jurisdiction in California, the court found that *Daimler* foreclosed it, because petitioner was generally "at home" only in Delaware (where it was incorporated), and New York or New Jersey (where it has its principal operations). *Id.* 16a-19a. Although the court recognized that "the company's ongoing activities in California are substantial," it concluded that they fell short of establishing general jurisdiction in California, which would have allowed petitioner to "be sued in California on any cause of action, whether or not related to its activities here." *Id.* 17a.

Noting, however, that this Court in *Daimler* had expressly preserved the "viability and breadth of [its] preexisting specific jurisdiction jurisprudence," the California Supreme Court focused its analysis there. *Id.* 20a-44a. It began by identifying the three elements of the specific-jurisdiction inquiry: "(1) whether the defendant has purposefully directed its activities at the forum state," "(2) whether the plaintiff's claims arise out of or are related to these forum-directed activities," and "(3) whether the

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[4] The Court of Appeal initially affirmed the general-jurisdiction holding, but reached specific jurisdiction on remand from the California Supreme Court after *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Pet. App. 5a-6a.

exercise of jurisdiction is reasonable and does not offend traditional notions of fair play and substantial justice." *Id.* 21a. It then proceeded to carefully consider each element in turn, despite petitioner's express recognition that it was "not contesting the first or third factors," and instead "contesting only whether the claims of the nonresident plaintiffs are related to its activities in California." *Id.* 21a n.2.

The court first held that there was "no question that BMS ha[d] purposefully availed itself of the privilege of conducting activities in California." *Id.* 24a. It explained that "[n]ot only did BMS market and advertise Plavix in this state, it employs sales representatives in California, contracted with a California-based pharmaceutical distributor, operates research and laboratory facilities in this state, and even has an office in the state capital to lobby the state on the company's behalf." *Id.* 24a-25a.

The court next concluded that respondents' claims were closely "related to" petitioner's California contacts. *Id.* 25a-35a. Petitioner did not dispute that the claims of the in-state plaintiffs met any version of the relatedness requirement. *Id.* 25a-29a. Further, petitioner admitted that *all* the claims—by in-state *and* out-of-state residents—arose from petitioner's "common nationwide course of distribution;" petitioner hadn't even "asserted that either the product itself or the representations it made about [it] differed from state to state." *Id.* 28a. Thus, "BMS's nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresident plaintiffs' claims and the

company's contacts in California regarding Plavix." *Id.*

The court rejected petitioner's contrary argument that the residents and non-residents merely asserted "parallel" claims. *Id.* 29a-30a. Although petitioner "contend[ed] that the nonresident plaintiffs' contacts would be exactly the same if BMS had no contact whatsoever with California," this argument "ignore[d] the uncontested facts." *Id.* The key was that "[t]he claims are based not on 'similar' conduct ... but instead on a *single*, coordinated, nationwide course of conduct," directed, in substantial part, into California. *Id.* 29a-30a (emphasis added).

Finally, although petitioner did not even dispute that asserting specific personal jurisdiction over the joint litigation would "comport with 'traditional notions of fair play and substantial justice,'" *id.* 35a-36a (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)), the court carefully considered the issue and found jurisdiction fair and reasonable under the circumstances. *Id.* 35a-44a. It concluded that requiring petitioner to defend both resident and non-resident claims in one forum would not be more burdensome than petitioner's alterative of addressing them in a "scattershot manner" in multiple states. *Id.* 37a-38a. The court also explained that the State had an interest in both adjudicating the conduct of McKesson and providing a forum for non-resident plaintiffs when information associated with their claims was plainly relevant to the related claims of its own citizens. *Id.* 38a-41a. Given the State's legitimate interest in the litigation as a whole, the absence of any substantial, marginal burden on

petitioner, and the benefits to the judicial process of litigating these claims together, the Court found personal jurisdiction appropriate in California. *Id.* 44a-45a.

4. Three Justices dissented. The dissent recognized that petitioner "contests neither the first prong" (purposeful availment) "nor the third" prong (reasonableness) of the specific-jurisdiction analysis. *Id.* 46a-86a (Werdegar, J., dissenting). But it nonetheless rejected the majority's holding—*not* by endorsing petitioner's causation test, which it found inconsistent with governing precedent, *id.* 68a, but because it disagreed about the characterization of the non-residents' claims. The dissent viewed them as "merely parallel" to the residents', and thus insufficiently connected to petitioner's California contacts. *Id.* 46a-51a.

This Court granted certiorari.

## SUMMARY OF THE ARGUMENT

This brief proceeds in four parts.

Part I explains that, in language and practice, this Court's consistent test for specific personal jurisdiction has never required that a defendant's forum contacts "give rise to" every claim in a case. Instead, it requires that the claims be "related to" those contacts, often—in multi-party or multi-claim cases—because they arise from the same "suit-related conduct," the defendant directs, in part, into the forum. *See, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984). There are thus multiple unanimous precedents irreconcilable with petitioner's

new causation test. Whether considered from the perspective of a state's lawful authority or fairness to the defendant, petitioner's test is theoretically unsound, achieves nothing the doctrine doesn't already cover, is inconsistent with everyday practices in civil litigation, and deprives states of authority they exercised from the Founding and well through the Fourteenth Amendment's enactment.

Part II explains that petitioner's test will also have serious negative consequences for the judiciary. It will throw doubt on traditional state cases, needlessly multiply litigation, and undermine settled doctrines of federal jurisdiction as well. Indeed, those practices and the federal statutes that support them are unconstitutional if assertions of judicial authority must be analyzed on petitioner's claim-by-claim and party-by-party approach. Still other federal statutes will become constitutionally dubious too.

Part III applies the correct test to the facts of this case. It explains that respondents' claims are "related to" petitioner's California contacts because they arise from the same common core of relevant conduct already subject to California's adjudicative power. And despite petitioner's concession, Part III walks through why personal jurisdiction over this entire litigation is fair and reasonable in California, so as to highlight the many reasons why personal jurisdiction in this case does not imply that every case about conduct causing nationwide injuries can be freely forum-shopped to any court at all.

Part IV closes by addressing errors in petitioner's remaining arguments. These include its selective quotations from certain cases, its confusion of personal-jurisdiction issues with choice-of-law concerns, and its mistaken conflation of this case with an assertion of general jurisdiction.

## ARGUMENT

At the outset, understanding this case requires bearing three key points in mind.

*First*, this case concerns only one third of the test for specific personal jurisdiction. Even where the "defendant *himself*" creates the necessary "minimum contacts" with a forum by (1) purposefully directing his (2) "suit-related conduct" there, *Walden*, 134 S. Ct. at 1122, personal jurisdiction over the litigation must (3) still be fair and reasonable in that State. Petitioner has conceded the third, core aspect of the inquiry (along with the first), but that concession should not obscure its key doctrinal role. As the California court explained, Pet. App. 35a-36a, petitioner frequently presses here issues that are properly analyzed through the "reasonableness" inquiry it conceded. Those issues are thus fully addressed already by the doctrine without any need for petitioner's new "causation" test.

*Second*, an important point should be made about how that overall "reasonableness" inquiry properly relates to the sliding-scale approach of the California Supreme Court. As this Court has said, where the fairness factors strongly tilt in favor of allowing a suit in a given forum, it may "sometimes serve to establish the reasonableness of jurisdiction

upon a lesser showing of minimum contacts than would otherwise be required." *Burger King v. Rudzewicz*, 471 U.S. 462, 477 (1985). Moreover, where a defendant purposefully creates lots of forum contacts, it will tend to make that forum's jurisdiction more fair and reasonable. It is thus natural to say that, where a defendant has lots of forum contacts, the connection between those contacts and the suit need not be as close.

But that is not exactly right. Even extensive, purposeful contacts that fail to meet the "at home" test for *general* jurisdiction under *Daimler* and *Goodyear Dunlop Tire Operations S.A. v. Brown*, 564 U.S. 915 (2011), can never justify *specific* jurisdiction unless a minimum, required relationship exists between those contacts and the controversy at issue in the case—no matter how reasonable the litigation might otherwise be. If the California Supreme Court's sliding-scale standard permitted specific jurisdiction over a claim *not* "related to" or "connected with" a defendant's forum-touching conduct, that would be incorrect. But that is not remotely what happened here, and the better reading of California's standard is one that simply echoes this Court's decision in *Burger King*, not one that permits specific jurisdiction to slide into general, all-purpose jurisdiction just because the defendant has extensive forum connections. *See* Pet. App. 20a-22a.

*Third*, that said, it is hard to fully capture the breadth of the settled practices petitioner's rule will upset precisely because, until recently, cases of this scale regularly and uncontroversially proceeded without distinguishing between specific and general

jurisdiction. Before the "pathmarking" decisions in *Goodyear* and *Daimler*—for 65 of the 70 years petitioner looks to for precedents, *see* Br. 11, and long before that, *see infra* at 33-34—it was understood that a corporate defendant that (like petitioner) did massive business in a state was subject to its general jurisdiction. *See, e.g.*, *Daimler*, 134 S. Ct. at 751 & n.18 (discussing abrogation of "doing business" standard). Critically, when this Court recently narrowed the scope of general jurisdiction over corporations, it did so in express reliance on how an expansive and flexible understanding of specific jurisdiction would fill the gap, *see id.* at 757-58 & n.10, just as *International Shoe* and its progeny did when they altered the territorial regime from *Pennoyer v. Neff*, 95 U.S. 714 (1878). *See Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 616-22 (1990) (discussing shift). Petitioner nonetheless seeks to layer on top of those general-jurisdiction holdings a new, strict limitation on specific jurisdiction, upsetting the careful balance they struck. This threatens not only "deep injustice," *Daimler*, 134 S. Ct. at 757-58 & n.10, but a rash of unintended consequences, as lower courts struggle to figure out which kinds of traditional cases that have survived well under *International Shoe*'s flexible inquiry—including vexing but now-resolved line-drawing problems in sensitive areas like family law, *see, e.g.*, *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84, 92 (1978)—will weather petitioner's new storm.

The overarching point is that petitioner has zoomed in on a narrow slice of a much broader doctrine, overlooking the tools already available to

address its policy concerns, and ignoring the doctrine's many moving parts. The flexible requirement that the litigation "relate to" or be "connected with" the defendant's forum contacts is as old as *International Shoe* itself, has been consistently articulated for 70 years, has never required petitioner's causal relationship, and (contrary to petitioner's suggestion) *has* supported specific jurisdiction over non-forum injury claims arising from a non-forum defendant's out-of-state conduct. *See infra* at 23-28. The consequences of now altering that test, especially in light of *Goodyear* and *Daimler*, are hard even to fathom—though they will run deep. The Court should adhere to its settled test.

## I. Specific Jurisdiction Attaches To Litigation That Either "Arises From *Or* Relates To" A Defendant's Contacts With The Forum, So Long As It Is Reasonable Under The Circumstances.

Under this Court's precedents, a state's power to provide a forum to adjudicate claims arising from a non-resident's conduct extends only to litigation that is (among other things) "related to" or "connected with" the defendant's forum contacts. By its terms and in practice, that test does not require that the defendant's forum contacts themselves *cause* every injury at issue in the case. Rather, "the defendant's *suit-related conduct* must create a substantial connection with the forum State." *Walden*, 134 S. Ct. at 1121 (emphasis added). As explained below, in the case of litigation by both resident and non-resident plaintiffs, *this* aspect of the due-process inquiry

requires only that the claims challenge a common course of conduct—based on a common set of operative legal theories and facts—that the defendant directed, in part, into the forum.

1. We begin with the Court's own consistent language for the relevant inquiry. In every case, this Court's personal-jurisdiction test has used near-identical variants on the same classic formulation, expressly framed in the alternative: The courts' assertion of specific jurisdiction must be "in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales De Colom., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (quoted in, *e.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality)).

In ordinary usage, "related to" is "deliberately expansive" language, "conspicuous for its breadth." *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (collecting cases). It indicates only that two things must be connected. *See* BLACK'S LAW DICTIONARY 1158 (5th ed. 1979) (defining "relating to" as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with"). Particularly when read in the context of this Court's personal jurisdiction precedents, "related to" *contrasts* with "arises from," precisely because only the latter connotes a causative link. Thus, the apparent reason this Court has included the broader phrase "related to" in its decisions time and again is to draw that contrast and avoid the creation of a bright-line, causal test. That, in turn, preserves the power of state courts to address cases in which some of the claims may be

"associated with" or "connected with" defendants' forum contacts, even if not all of the claims arise directly therefrom.

Beginning with the seminal decision in *International Shoe*, this Court has, accordingly, elaborated on the "relatedness" element of specific jurisdiction in expansive and accommodating terms that are irreconcilable with a categorical causation requirement. "In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, *or connected with*, the very controversy that establishes jurisdiction." *Goodyear*, 564 U.S. at 919 (emphasis added); *Int'l Shoe*, 326 U.S. at 319 (providing that disputes at issue must be ones that "arise out of or are *connected with* the activities within the state" (emphasis added)); *Nicastro*, 564 U.S. at 881 (plurality) (quoting same language).

Relatedly, this Court has always required a connection between the "litigation" or the "suit" and the defendant's forum contacts; no case has required that *every claim* that is properly part of a single case be analyzed independently. *See, e.g.*, *Walden*, 134 S. Ct. at 1115 ("[S]pecific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and *the litigation*." (emphasis added)); *Keeton*, 465 U.S. at 775 (same); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (same). Remarkably, in the two crucial passages where petitioner's brief suggests that the analysis is claim-by-claim or plaintiff-by-plaintiff (at 13, 49-50), it cites no case saying anything of the sort.

In combination with the other aspects of the inquiry, this Court's broad language supports a simple and well-recognized formulation for the breadth of a forum's specific personal jurisdiction over a case or controversy: Assuming a defendant has (1) purposefully directed its activities at the forum and (2) asserting personal jurisdiction is otherwise fair and reasonable, the forum may extend its jurisdiction over the defendant "confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Goodyear*, 564 U.S. at 919 (quoting Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121, 1136 (1966)). Put otherwise, when a defendant submits certain conduct to the adjudicatory power of a state by directing that conduct into both that forum *and others*, the state can hale the defendant, adjudicate that conduct, and determine any claims or issues "connected with [that] controversy" in deciding the case before it—as long as it is otherwise fair and reasonable to do so. *Id.*; *Keeton*, 465 U.S. at 774-75.

2. Petitioner's principal justification for cabining specific personal jurisdiction far more narrowly rests on the premise that the due-process inquiry "is in the first instance a question of authority rather than of fairness." *Nicastro*, 564 U.S. at 883 (plurality); *see also* Br. 25-27 (discussing, first, "territorial limitations on state power"). From that premise, petitioner reasons that the states lack authority to adjudicate *any* claims that do not arise from the defendant's contacts with their territory. *Id.* 26. But whether one focuses on fairness to the defendant or

the authority of the state courts, petitioner's argument goes nowhere. In fact, focusing on authority helps to isolate the problems in petitioner's argument, because it is clear from numerous precedents—both directly on point and closely analogous—that courts *do* have authority to adjudicate claims that are closely "related to" those over which it has power as part of a single case, even if they might lack power over those claims analyzed on their own. This Court's precedents simply do not require a causal connection between a defendant's forum contacts and every claim of injury the court adjudicates in a case, and for good reason.

a. Initially, all agree that a State's authority to exercise specific personal jurisdiction over certain conduct by a non-resident defendant comes from the relationship between that conduct and the defendant's forum contacts. At least when the defendant intentionally directs that conduct into the state and it causes injury there, the state clearly has the authority to adjudicate the lawfulness of that conduct—whether it occurred in the state or not. *Calder v. Jones*, 465 U.S. 783, 788-89 (1984); *Keeton*, 465 U.S. at 780. As the *Nicastro* plurality explained, the defendant "submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised *in connection with* the defendant's activities *touching* on the State." 564 U.S. at 881 (emphases added). In other words, when a defendant purposefully touches a State with its activities, it gives that State the power to adjudicate a litigation about those activities—the power to determine if they were lawful or not. That power necessarily includes

the ancillary authority to determine all claims and issues directly "connected with" those activities—whether they concern in-state injuries or not, *Goodyear*, 564 U.S. at 919—assuming, again, that jurisdiction is otherwise reasonable.

Requiring only this non-causal "connection" makes sense because the defendant's submission of the relevant, out-of-state conduct to the "judicial power" of a state does not mean the state exercises any *regulatory* or legislative power over that out-of-state behavior. The existence of specific jurisdiction does not mean the forum-state's *law* applies: A state court might apply federal law, the law of the state where the injury happened, or the law of the state where most of the operative facts occurred. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816-22 (1985) (permitting Kansas courts to adjudicate claims of out-of-state plaintiffs even while requiring them to choose non-Kansas law for those plaintiffs' claims). Instead, the state court merely provides a forum to adjudicate the same claim that would otherwise be litigated by the same plaintiff against the same defendant, because the forum can adjudicate (and already is adjudicating) closely related claims against the defendant brought by those injured within the state by the same operative conduct. *Keeton*, 465 U.S. at 777-80.

From a fairness perspective, the burdens imposed by such litigation on the non-resident defendant are minimal, given the "connection" required between the litigation and the defendant's forum contacts. That requirement imposes genuine constraints. A sufficient "connection" exists only

where the forum is one to which the defendant has *already* submitted the relevant conduct because it directed that conduct there and harmed forum residents. Accordingly, the defendant is not being subjected to the burden of appearing anywhere it has not already purposefully created an obligation to defend itself regarding the same core issues.

Further, because the forum's power extends only to "issues ... connected with[] the very controversy that establishes jurisdiction," *Goodyear*, 564 U.S. at 919, the forum cannot force the defendant to provide discovery, generate new and different legal defenses, or suffer any other litigation burdens not already associated with the issues germane to the in-forum plaintiffs' claims. The required "connection" thus exists only where the claims of the non-forum residents track those of the residents on both the operative facts and relevant law. The upshot is that the defendant faces no greater burden—and generally a much lesser one—than it would if every plaintiff instead exercised its right to sue in her own home state.

b. Not only is such joint litigation perfectly natural as a matter of both state authority and procedural fairness, it has also been explicitly approved by this Court's precedents. This Court has squarely rejected petitioner's essential argument that a state court categorically lacks the sovereign authority to adjudicate together claims for injuries arising in multiple states from the same identical conduct occurring outside the forum—*i.e.*, claims that do *not* "arise from" defendant's forum contacts.

The state courts' settled power in this regard is illustrated by two opinions for the Court by then-Chief Justice Rehnquist. Neither generated any dissent. And both were decided contemporaneously with several of this Court's seminal decisions addressing specific jurisdiction. *See, e.g.*, *Burger King*, 471 U.S. 462; *Helicopteros*, 466 U.S. 408; *Calder*, 465 U.S. 783; *Keeton*, 465 U.S. 770. Surprisingly, neither petitioner nor the Solicitor General discusses—much less tries to distinguish—either one.

In the first, *Keeton*, a non-resident plaintiff filed suit in New Hampshire against a non-resident publisher (Hustler). 465 U.S. at 772. The plaintiff alleged that Hustler's magazine defamed her not merely in New Hampshire (where relatively few copies were distributed) but in each of the fifty states where copies were sold. She thus sought damages in New Hampshire for her claims regarding her injuries incurred in every other state. The defendant urged this Court to hold that New Hampshire's assertion of specific jurisdiction over injuries allegedly caused and suffered in other states violated the Due Process Clause. This Court said no. *See id.* at 772-74.[5]

Preliminarily, the plaintiff argued that no due-process issue even arose because her suit asserted

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[5] *Keeton* was a federal-court case but was analyzed like a state-court suit because personal jurisdiction was predicated on New Hampshire's long-arm statute. *Id.* at 774.

only a single New Hampshire cause of action, which under the "single publication rule" permitted the plaintiff to recover the damages she incurred in every state. This Court rejected that argument and instead agreed with the defendant that the "contacts between respondent and the forum must be judged in light of [her multi-state] claim, rather than a claim only for damages sustained in New Hampshire." *Id.* at 775.

In nonetheless finding specific jurisdiction over the entire litigation, the Court necessarily rejected the argument that there must be a causal relationship between the defendant's forum contacts and the plaintiff's out-of-state injuries. Nothing Hustler did in New Hampshire had any causal relationship with injuries suffered elsewhere; instead, just as here, all the injuries in New Hampshire and elsewhere arose from the common out-of-state cause. *Id.* at 780. And yet this Court held that the state courts could assert specific jurisdiction where, just as here, a case concerning nationwide conduct, and seeking redress for nationwide injuries, "arises out of the very activity being conducted, *in part*, in [the forum]." *Id.* (emphasis added). That holding decides this case.

Accordingly, at a pivotal point in its brief—where petitioner undertakes to prove that "no case" has ever permitted a state court to resolve claims not causally related to the defendant's forum contacts, Br. 17—petitioner carefully omits the words "in part" from its quotation of *Keeton*, implying that *all* the claims there "'*ar[o]s[e] out of* the very activity being conducted' in the State." Br. 19 (petitioner's alterations). This dramatically distorts *Keeton*'s core

holding, which petitioner (and the government) nowhere discuss.

Notably, even after this Court determined in *Keeton* that the regular sale of the defamatory issues of Hustler in New Hampshire sufficed to create the requisite "minimum contacts" for all the nationwide claims of injury, it recognized that this was not the end of the inquiry. Instead, this Court held that for the litigation to be consistent with due process, "the contacts between [the defendant] and New Hampshire must be such that it is 'fair' to compel [it] to defend a multistate lawsuit in New Hampshire seeking nationwide damages for all copies of the [magazine] issues in question, even though only a small portion of those copies were distributed in New Hampshire." *Id.* at 775. Performing that separate analysis, this Court concluded that the foreign defendant could fairly be haled to New Hampshire with respect to its distribution of the magazine in other states because it "produces a national publication aimed at a nationwide audience," such that "[t]here is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed." *Id.* at 781. That was so "even though the bulk of the harm done to petitioner occurred outside New Hampshire," *id.* at 780, and that forum *alone* had a limitations period that had not yet run out on the plaintiff, *id.* at 778-79.

Importantly, the Court reasoned not only that the assertion of jurisdiction over all the claims would "protect defendants from harassment resulting from multiple suits," but also that the states themselves

have "a substantial interest in cooperating with other States ... to provide a forum for efficiently litigating all issues and damages claims" together in a single forum. *Id.* at 777. Among other things, that "reduces the potential serious drain [of the litigation] on judicial resources" in multiple state courts. *Id.* "In sum, the combination of [the forum's] interest in redressing injuries that occur within the State and its interest in cooperating with other States in the application of the 'single publication rule' demonstrates the propriety of requiring respondent to answer to a multistate libel action in New Hampshire." *Id.* at 777-78.

The very next year, this Court reaffirmed that the Due Process Clause preserves the state courts' important role in resolving multi-state litigation—including claims that arise outside the forum. In *Shutts*, the defendant (Phillips), was a Delaware corporation with its principal place of business in Oklahoma. 472 U.S. at 799. A class of royalty owners from many different states filed suit in Kansas over allegedly delayed payments on natural gas Phillips produced or purchased from "leased land located in 11 different States." *Id.* Little of the relevant conduct and resulting injury occurred in Kansas. *Id.* Phillips thus argued that the class action violated due process under *International Shoe* because the Kansas state court was asserting personal jurisdiction over the claims of non-resident plaintiffs whose injuries arose outside the forum. On its view, because there was "no prelitigation contact with many of the plaintiffs and leases involved,"

Kansas could not adjudicate those plaintiffs' claims for want of "minimum contacts." *See id.* at 807-08.

This Court, again, unanimously said no. Instead, it held that, although the Kansas court could not apply substantive Kansas *law* to claims not arising from Phillips's conduct in the state, it could provide a forum to *adjudicate* those claims. *Id.* at 823. That is a foundational holding of modern complex litigation: Not one Justice disagreed, and it has been the basis on which state courts have adjudicated innumerable multi-state class actions for more than thirty years.

*Shutts* is flatly irreconcilable with petitioner's argument, particularly when it comes to the "lawful authority" of state courts. *Nicastro*, 564 U.S. at 887. *Shutts* squarely held that the state court had the power to adjudicate a claim arising from conduct occurring entirely outside the forum and that caused the plaintiffs' injuries entirely outside the forum. The Court instead assessed the reasonableness of the litigation as a whole, without taking a claim-by-claim, causation-only approach to the relatedness inquiry.[6]

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[6] To be sure, *Shutts* found specific jurisdiction was fairly asserted over the non-resident plaintiffs; it did not expressly address fairness to the non-resident defendant. *See* 472 U.S. at 809-11. But particularly because fairness to the defendant is even less disputed here than it was in *Shutts*, the relevant point is that *Shutts* recognized the state court's *authority* over "the absent class members *and their claims against petitioner*." *Id.* (emphasis added). It would also be absurd to believe that

3. Beyond these two unanimous precedents, petitioner's argument is also irreconcilable with this Court's cases governing other, highly analogous areas of law.

a. Begin with the countless, everyday situations in which adjudicating the entire controversy between two parties requires a court to decide multiple claims concerning the same common core of operative, out-of-forum conduct that causes injuries in more than one state. (One frequent example involves multi-state claims of copyright or trademark infringement, *e.g.*, *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158 (2d Cir. 2010)). According to petitioner, any controversy between two large companies involving harms arising in more than one state must almost invariably be brought in the defendant's home state (under general jurisdiction). If the defendant is an international firm, there may be no court at all where such claims can be adjudicated together. Br. 50. Not only would this make even the most basic of complex civil cases brutally inefficient, it also lacks any justification as a matter of fairness or state-court authority. Because the parties are already litigating about that same core conduct, neither can claim to be procedurally prejudiced by efficiently deciding the multi-state claims together. And because the state court is already exercising the power to determine

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*Shutts* would have reached the exact opposite result if the petitioner had only invoked its *own* due-process rights, rather than those of the non-resident plaintiffs.

the legal consequence of those operative facts, it is perfectly natural for it to determine that question wherever the conduct already subject to its judicial power has caused harm in the same way, governed by the same legal standard.

To see this, imagine a case in which a Nevada company alleges that another Nevada company's manufacturing negligence in Nevada caused the defendant not to deliver goods in California and Nevada, injuring the plaintiff's business in those states. A California court plainly has specific jurisdiction over a claim for the California damages. And few if any would doubt that the California court also has specific jurisdiction over the closely related claim for the Nevada damages that arose from the exact same negligence. *See, e.g.*, 6 Wright & Miller, Fed. Prac. & Proc. §1478 (approving of amendments adding claims in such circumstances without further regard to personal jurisdiction, and collecting cases); *infra* at 31. Both claims arise from the same core of operative facts; the state court adjudicates the lawfulness of the exact same out-of-state conduct in both scenarios.

On petitioner's conception of the power of state courts, however, this ordinary and utterly efficient litigation is suddenly impossible: The California court already has specific jurisdiction over the plaintiff, defendant, and negligent conduct at issue, but cannot touch the injury that happened in Nevada, because it was not caused by the defendant's California contacts. From the standpoint of judicial authority, this makes no sense whatsoever—the California court's determination about the allegedly

negligent conduct already has binding force as between these two parties in any other suit through a core application of (mutual) collateral estoppel. *See, e.g.*, *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 320-21 (1971).

For this reason, the leading civil procedure treatise repeatedly recognizes that, when it comes to the various procedures through which parties may ask courts to jointly adjudicate multiple claims, the sensible approach to personal jurisdiction is to rely on the same "relatedness" rule that allows these claims to be brought together in the first place—they must arise from "the same common nucleus of operative facts." *See* Wright & Miller, §1478 (approving of personal jurisdiction over an added claim on the basis of the existing case "when the original and added claims are sufficiently related to bring them within the test for applying supplemental jurisdiction"); *id.* §1588 (same for joinder, and articulating supplemental-jurisdiction test). That is true for amendments that add claims to existing cases, *id.* §1478, certain cross-claims or compulsory counterclaims by existing parties, *id.* §§1416, 1433, and joinder procedures, *id.* §§1445, 1588. For each, the treatise explains that personal jurisdiction is appropriate because, for the joint litigation of the claims to be appropriate in the first place, they must already be "so related" that parties "would ordinarily be expected to try them all in one judicial proceeding." *Id.* §1588 (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725-26 (1966)).

b. Holding that a state court lacks jurisdiction in even these narrow circumstances would also be

bizarre, because the Due Process Clause plainly permits plaintiffs to accomplish the same result in a fashion substantially less fair to defendants and more burdensome for the judiciary.

Petitioner's causation test notwithstanding, it is settled that due process permits plaintiffs like respondents to take advantage of a judgment issued by a forum in favor of in-forum plaintiffs under the doctrine of non-mutual offensive collateral estoppel. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). In this case, for example, if respondents do not litigate their claims in California, their own home-state courts can give them the preclusion benefit of a California judgment against petitioner on the in-state plaintiffs' claims. *See id.* at 326-30. From a practical standpoint, that means the first court's adjudicative power includes rendering decisions enforceable against the respondents' closely related claims—exactly what respondents seek from the California court here.

Petitioner's test would therefore create an absurd anomaly, in addition to a wasteful multiplication of judicial proceedings. The non-resident plaintiffs could preclusively rely on a favorable judgment from the first forum state. *Id.* But because they are not parties, the defendant cannot invoke preclusion against them. *Blonder-Tongue*, 402 U.S. at 329. All the while, the defendant of course bears the cost of defending all the proceedings in additional states around the country, while both state and federal courts are subjected to a seriatim waste of resources. *See, e.g.*, *Parklane*, 439 U.S. at 330 (preferring joinder to estoppel precisely because the latter "will

likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening"); *Keeton*, 465 U.S. at 777 (noting potential for harassment of defendant with serial cases).

c. Relatedly, petitioner's cramped view of the power of state courts is fundamentally ahistorical and promotes a form of "federalism" no constitutional drafter would have recognized. From the Founding through Reconstruction (and at least until *International Shoe*), it was within the power of states to make corporations amenable to process for all causes of action within a given state by requiring appointment of an agent. *See, e.g.*, *The Lafayette Ins. Co. v. French*, 59 U.S. 404, 408 (1855). State courts also had the power to adjudicate claims against non-resident defendants to the extent of any property held within the State. *See, e.g.*, *Pennoyer*, 95 U.S. at 722-24. The Constitution did not create inferior federal courts; it was expected that state courts would entertain *all* manner of suits, including cases among citizens of multiple states. *See* U.S. Const. art. III §1; Judiciary Act of 1789, §11, 1 Stat. 73, 78-79 (creating *concurrent* diversity jurisdiction). State courts did have tightly cabined geographical reach for their process—as did the federal courts when Congress created them, *id.* §11—but the states retained authority to subject all persons and property within the state to their jurisdiction—including *especially* any corporation wishing to do business therein. *See, e.g.*, *Paul v. Virginia*, 75 U.S. 168, 181-83 (1868); *Burnham*, 495 U.S. at 612-20 (discussing

pre-*International Shoe* approach); Br. of Prof. Stephen Sachs, *BNSF Railway Co. v. Tyrrell*, No. 16-405, at 6-8 (discussing original understanding of corporate amenability to suit, and collecting cases).

In substituting *International Shoe*'s regime for these more technical, territorial conceptions of state adjudicatory authority, this Court displaced some of the states' traditional sovereign powers over property within the state and corporations doing business there—a reasonable consequence of the more-adaptable, specific-jurisdiction-based approach. *See, e.g.*, *Goodyear*, 564 U.S. at 923-25; *Shaffer*, 433 U.S. at 207-12 (holding that, after *International Shoe*, property in a State must be related to cause of action for *in rem* jurisdiction); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952) (doubting continuing relevance of in-state agent for receiving process). But at no point were the states' adjudicatory powers limited to claims where the harm at issue arose from the defendant's in-state conduct. In fact, at the very time the Fourteenth Amendment was enacted, *many* states had statutes expressly defining how their statutes of limitation would apply to suits *by* non-residents, *against* non-residents, that *arose outside* the forum. *See, e.g.*, *Can. N. Ry. Co. v. Eggen*, 252 U.S. 553, 560 (1920).

Indeed, petitioner's proposed limitation would require state courts to shut their doors to citizens of other states asking to proceed against a defendant's property within that state, or to join a case in which the defendant was already properly before that state's courts respecting the same conduct. That would be an affront to federalism (and the Privileges

and Immunities Clause), not a celebration. *See, e.g.*, *id.* at 562 (the Privileges and Immunities Clause protects "'the right of a citizen of one state ... to institute and maintain actions of any kind in the courts of' another").

At bottom, petitioner's conception of federalism is one where, because this case involves multi-state claims, it implicitly lies outside the power of individual states under something like the dormant commerce clause (or, perhaps, dormant Article III). *See, e.g.*, Br. 17 n.4, 51 (preserving possibility that federal courts could handle such multi-state cases). It is also an even-more-aggressive version of using the Due Process Clause as an atextual and ahistorical limit on the power of sovereign states to increase the liability of a defendant properly before it on account of related, out-of-forum conduct. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 602-03 (1996) (Scalia, J., joined by Thomas, J., dissenting). For those deeply concerned with original meaning, adjudicatory powers exercised by the states, as of the Fourteenth Amendment's ratification, over corporations that chose to do business therein, cannot be abrogated by petitioner's novel re-reading of the Due Process Clause. What petitioner really wants is to thread the needle to a newfound corporate immunity inconsistent with *both* the traditional

approach to personal jurisdiction and the modern one.[7] That project should not be obliged.

4. To repeat, none of the foregoing suggests that a state's specific jurisdiction attaches to every case aggregating nationwide claims of injury arising from conduct directed, in part, into the state. Far from it. Even when the litigation has the required "connection" to the defendant's forum contacts, courts must consider the multi-state nature of the claims and associated state interests, among other factors, in determining whether personal jurisdiction over the litigation in a forum is fair and reasonable. *Keeton*, 465 U.S. at 775; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). This inquiry includes "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several

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[7] If the Court will not preserve the flexible "relatedness" inquiry that prompted *International Shoe*'s due process innovation, it should instead overrule *International Shoe* and its progeny (like *Shaffer*) to the extent they purport to derive *any* non-*traditional* limits on personal jurisdiction from the Due Process Clause. Otherwise, states will be deprived in fact of jurisdiction they held at the Fourteenth Amendment's enactment—although, remarkably, *only* in the case of corporate defendants. *See Burnham*, 495 U.S. at 621 (preserving general jurisdiction against *individuals* served while passing through on unrelated matters).

States in furthering fundamental social policies." *Burger King*, 471 U.S. at 477.

This reasonableness inquiry will often foreclose a group of plaintiffs from complaining about common, nationwide conduct in any court they choose. If—as in the nightmares of petitioner's *amici*, but unlike here—very few of the plaintiffs are from that forum, or there is no in-forum defendant, or taking discovery there is unusually burdensome, or that court's procedures for some reason unfairly disfavor the defendant, personal jurisdiction may not lie over the case.

Even when it does, other tools are available to alleviate possible unfairness. *See Burger King*, 471 U.S. at 483-84. A forum that *can* exercise specific personal jurisdiction over a multi-state case against the defendant need not always do so. For example, it can, and sometimes must, transfer the case to another venue with a superior connection to the litigation under either general venue considerations or *forum non conveniens*. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

Finally, because cases like these involve interstate commerce, there is Congress's power to regulate how they can be tried, including by expanding removal. *See supra* at 7-8 (discussing CAFA and mass-accident provision). And Congress is right now considering even further amendments along these lines to the rules governing complex litigation in federal court, Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong., showing that the prospect of legislative intervention

is not merely theoretical. This provides yet another, critical reason to reject petitioner's proposed constitutional rule: If problems remain under the existing regime, Congress can fix them; if this Court constitutionalizes a new paradigm of specific personal jurisdiction, Congress cannot.

## II. Adopting Petitioner's Novel Causation Requirement Would Multiply Litigation, Disrespect Federalism, And Substantially Disrupt The Operations Of State And Federal Courts.

A ruling by this Court accepting petitioner's argument would substantially disrupt the operations of the state courts, and likely the federal courts as well. It would significantly increase the amount of litigation—causing cases that previously proceeded together efficiently to be adjudicated separately in courts around the nation, while also generating more collateral litigation about claim and issue preclusion. Enormous segments of complex civil litigation will be open to attack, and potentially unsalvageable. The Due Process Clause has never before been read to require such disruptive results.

1. Start with the state court cases most like this one. Although petitioner never acknowledges it, its bottom-line position is that the Due Process Clause almost always prohibits a court from asserting specific jurisdiction over the claims of non-forum plaintiffs against non-forum defendants. Br. 50. That is a radical contraction in the jurisdiction of the state courts over multi-state claims (like *Keeton*) and multi-state class actions (like *Shutts*). State courts

have been adjudicating such cases with this Court's approval since *Shutts* was decided; in fact, the California Supreme Court pointed to a 20-year history of such cases in its courts—a history petitioner was "on notice" about when it chose to direct its nationwide conduct into California. *See* Pet. App. 33a (collecting cases); *compare Keeton*, 465 U.S. at 780 (flagging constructive notice of possibility of multi-state claims under New Hampshire law).

Petitioner's argument would not merely shift complex state-court litigation from one state court to the defendant's home state, where it would be subject to general jurisdiction. Often, it would make that litigation impossible. Such suits frequently involve multiple defendants that do not share a home forum. Under petitioner's rule, no state court could fully and efficiently adjudicate such litigation. Rather than jointly litigating their claims challenging the identical wrongful conduct in one state court, the plaintiffs must proceed before fifty, or perhaps bring the same exact joint case against two different defendants in two courts simultaneously on opposite sides of the country. The result of such a rule will often be inconsistent judgments on identical legal questions, creating far greater difficulties for defendants, plaintiffs, and the judicial system as a whole than would arise from litigating the claims together. *See* Pet. App. 32a-35a.

What would happen, for example, if McKesson loses in California and is adjudicated jointly and severally liable for all the plaintiffs' injuries, while petitioner prevails against the same plaintiffs in New Jersey? Can McKesson sue for contribution in

California? Can it sue for contribution anywhere given the New Jersey judgment? If respondents are cleaved off, and subsequently sue both McKesson and petitioner in their home states, is McKesson already on the hook for *all* the damages? These issues are all intimately related to the same controversy. It serves no one's interests to force their inefficient and disjointed litigation in multiple forums—save, perhaps, petitioner's "candid" interest in making it as hard as possible to seek relief. *See supra* at 8.

Petitioner's argument would also create grave doubts surrounding historic state-court powers, like the authority to probate an estate by resolving all claims against it. This Court has long recognized "the power of a State to make the whole administration of the estate a single proceeding," and thus to determine issues connected to the administration that are not causally related to the forum. *N.Y. Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916).[8] The constraint, of course, is that a "relatedness" inquiry applies, and does not permit the state court to thereby resolve "plainly collateral" disputes. *Id.* at 518-19. Petitioner's approach may well render this whole paradigm unconstitutional,

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[8] This probate-court power derived from *in rem* jurisdiction over estate property. But because *Shaffer* subjects the *in rem* power to *International Shoe*'s minimum-contacts inquiry, *supra* at 34, a causal test for that inquiry will make the probate court's power much more problematic.

subjecting the determination of complex estates to endless collateral attack.

2. Petitioner obliquely suggests that its position will not be so calamitous because federal courts might pick up the multistate slack. Br. 50-51. There are at least three key problems with relying on this emergency parachute to take petitioner's proposed leap.

First, as a practical matter, this often just won't happen, as the Solicitor General acknowledges (at 32). Non-diversity or amounts in controversy frequently deprive federal courts of subject-matter jurisdiction over tort suits. Moreover, the district courts rely in such cases on their home states' long-arm statutes—which typically extend to the same due process limit—for their personal jurisdiction. *See* FED. R. CIV. P. 4(k)(1)(A). The same multiplication of litigation thus inevitably results; the federal courts will have no more power to hold these cases together than their state-court counterparts. That seemingly includes even the most obviously appropriate class actions brought under Rule 23.[9]

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[9] Lacking courage in the face of its own reasoning, the government suggests its causation "rule" could give way to, at least, a federal-court exception, Br. 31 n.4, a class-action exception, *id.* 32 n.5, and a super-special-statute exception, *id.* 33 n.6. This kind of "bestiary of *ad hoc* tests and *ad hoc* exceptions," *Comptroller v. Wynne*, 135 S. Ct. 1787, 1809 (2015) (Scalia, J. dissenting), will surely overwhelm the lower courts,

Second, as a theoretical matter, this is not a sensible basis on which to allocate state-court authority. As noted, the Constitution does not presuppose the existence of *any* federal court with original jurisdiction over such cases; the general design of "Our Federalism" is for federal courts to respect and avoid interference with state-court adjudication, *Younger v. Harris*, 401 U.S. 37, 44 (1971), not presumptively preempt it by their mere existence. Moreover, it is evident from the fact that these are common-law cases that there is no difference between state-court and federal-court adjudication here: *Neither* will assert any prescriptive powers of its associated sovereign; both simply provide a forum for the adjudication of claims potentially governed by another sovereign's laws.

Third, and perhaps most important, there isn't any textual basis to distinguish between the state and federal courts in this regard. To treat them differently requires believing that the *identical* words in the Fifth and Fourteenth Amendments mean different things. Petitioner reduces this critical issue to a footnote, in which it declines even to endorse the federal power on which it relies or provide the Court with any guidance on how the question should be assessed. *See* Br. 17 n.4. This Court has not otherwise applied different constraints against the

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and it speaks volumes about the doctrinal soundness of petitioner's rule.

state and federal governments in parallel circumstances; both are surely required to provide equivalent "process" when depriving individuals of their liberty or property.

Petitioner's own argument very strongly suggests that its rule applies equally to the federal courts, which would be subject to the identical constraints on multi-state litigation as the state courts—at least in state-law cases like these. Much of petitioner's argument rests on unfairness that arises from geography, without regard to the sovereign that created the court. For example, petitioner contends that other forums are unpredictable, both in the locations it may have to travel, and the choice-of-law rules that may apply. Br. 29. But such arguments apply equally to both San Francisco courthouses: the California Superior Court and Northern District of California are a ten-minute walk apart, and apply the same choice-of-law rules to common-law tort cases. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Petitioner's argument would thus categorically preclude subjecting the defendant to suit outside the confines of either its own home state (where it is subject to general jurisdiction) or the state in which the injury allegedly occurred (where alone it is subject to specific jurisdiction). Federal courts in other states are closed too.

That reasoning, in turn, would render unconstitutional federal multi-state class actions and the entire federal multidistrict litigation scheme. *See* 28 U.S.C. §1407. The MDL court can render pre-trial judgment for either side, but has no causative connection at all to many plaintiffs' claims (including,

especially, state-law claims). It might also invalidate a huge swath of federal bankruptcy practice, which centralizes claims (including state-law claims) against the estate in a single forum given nationwide personal jurisdiction. *See* FED. R. BANKR. P. 7004(f). It would also endanger the jurisdictional provisions of multiple federal statutes providing for nationwide jurisdiction to facilitate multi-state claims or class actions. *See, e.g.*, Wright & Miller, §1118 & nn.5-8 (collecting major statutes). Indeed, in cases involving foreign defendants that engage in illegal activity abroad that harms U.S. citizens (such as international terrorism and price fixing), there may be *no* court with jurisdiction to decide the kind of joint case that provides the sole pathway to effective relief. *See Keeton*, 465 U.S. at 778-79.[10]

3. It gets worse. Petitioner's entire claim-by-claim analytic framework for assessing a court's "lawful authority" is inconsistent with a host of critical precedents that allow litigation to be simplified by joining claims together. Ironically, some of these are invoked by the Solicitor General (at 30-31) as salutary examples of how Congress has provided "a single, efficient federal forum for particular classes of claims," even though these

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[10] The Anti-Terrorism Act is particularly problematic under petitioner's test. *See* 18 U.S.C. §2334(a)-(b) (allowing personal jurisdiction wherever "defendant resides, *is found, or has an agent,*" even for acts *not* within "special maritime or territorial jurisdiction" of the sovereign (emphasis added)).

multi-claim, case-management options are irremediably undermined by petitioner's argument.

Start with CAFA and 28 U.S.C. §1369, both of which purport to allow federal jurisdiction in "minimal diversity" cases. Analyzed on a plaintiff-by-plaintiff or claim-by-claim basis, these statutes are unconstitutional: A federal court has no lawful authority over a non-diverse plaintiff's state-law "claim." U.S. Const. art. III §2. Put otherwise, from their individual standpoint, non-diverse parties are subjected to the power of a court that has no independent authority over them, even though "[d]ue process protects [a party's] right to be subject only to lawful authority." *Nicastro*, 564 U.S. at 887. The answer that such a party can be subjected to the court's broader authority over the entire litigation is, of course, an answer that decides this case against petitioner.

The same relatedness inquiry that governs these minimum diversity statutes governs numerous other circumstances in which federal courts extend their adjudicatory power over claims they could not independently reach. That includes ordinary "supplemental" jurisdiction, *see Gibbs*, 383 U.S. at 725-26; 28 U.S.C. §1367, and "party-pendent jurisdiction," which allows a federal court to add related claims by third parties to federal cases, even if those parties' *only* claims are otherwise outside its reach. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 557-66 (2005). For each of these doctrines of adjudicatory authority, it is accepted that the courts' lawful power extends to claims that arise from the same "common nucleus of operative fact."

*Gibbs*, 383 U.S. at 725; *see also Allapattah*, 545 U.S. at 557-66. And it is thus unsurprising that similar formulations can be found in this Court's articulations of the relatedness prong of specific personal jurisdiction. *See supra* at 18-20; *Rush v. Savchuk*, 444 U.S. 320, 329 (1980) ("The insurance policy is not the subject matter of the case, however, nor is it related to the *operative facts* of the negligence action." (emphasis added)).

Indeed, the bulk of the federal courts (and the leading treatise) have approved an explicit doctrine of "pendent personal jurisdiction," which permits district courts to reach claims over which they otherwise lack *personal* jurisdiction because they are properly part of a case they do have the lawful authority to adjudicate against the defendant. *See* Wright & Miller, §1069.7 (collecting cases). That doctrine fully resolves a case like this one, and conversely, petitioner's bright-line rule necessarily scuttles this fair and efficiency-enhancing doctrine, while also threatening to raise intractable problems for all the doctrines above. Rather than ask, as *Goodyear* puts it, whether the "issues" the court is asked to decide "deriv[e] from, or [are] connected with, the very controversy that establishes jurisdiction," 564 U.S. at 919, the courts will be forced to determine for each claim whether it has an independent causal connection to defendants' forum contacts. If they find that it does not, their power over the entire case suddenly disappears.

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All these radical consequences are only the tip of the iceberg. Changing the fundamental rules that empower courts to resolve complex, multi-party litigation will likely lead to many more unforeseen complications and harms as blindsided state trial, probate, and family-law courts struggle to sort out the consequences of disturbing settled expectations about how their cases can be handled. Simply put, causation has never been understood as a bright-line rule governing when related, individual claims may be aggregated into a single case and adjudicated together by a forum that possesses the necessary connection to the overall controversy. And, again, adopting that as a new *constitutional* rule will not only cause serious and unforeseen problems, but make them impossible for even Congress to fix.

## III. Under The Correct Due Process Standard, The California Courts Have Specific Jurisdiction Over Respondents' Claims.

Petitioner does not dispute that unless this Court adopts its novel causation requirement, the California courts properly exercised specific jurisdiction. Accordingly, respondents only briefly address the application of the correct test.

### A. The Litigation "Arises From Or Relates To" Contacts Petitioner Itself Created With California.

1. At the outset, there is no question that petitioner intentionally directed its uniform, nationwide Plavix-related conduct into California.

Petitioner does not dispute this question, *see supra* at 10-11, but in any event, *Keeton* shows that it is indisputable. In its own words, petitioner "marketed, promoted, and sold Plavix as part of a nationwide course of conduct," that it "implemented" in "various States across the country—including California." Br. 48 (quoting Pet. App. 29a-30a). Part of that implementation involved directing some *180 million pills*—at about $4 each—into California. *Keeton* held it "unquestionable" that Hustler's nationwide, defamatory conduct had the requisite connection to New Hampshire because Hustler circulated, at most, 75,000 defamatory magazines there over five months. 465 U.S. at 774. This issue is, accordingly, five orders of magnitude easier than "unquestionable."

2. Under a correct understanding of the relatedness inquiry, *Keeton* also shows that respondents' claims have the requisite "connection" with these intentionally created contacts. In *Keeton*, this Court evaluated the "contacts among respondent, New Hampshire, and th[e] *multistate libel action*," *id.* at 778 (emphasis added), and held that specific jurisdiction was appropriate in New Hampshire regarding injuries caused by the magazine's nationwide circulation. The Court's closing summary highlighted the two key facts—that Hustler "produce[d] a national publication aimed at a nationwide audience," and that it "continuously and deliberately exploited the New Hampshire market" for that national product. *Id.* at 781. This made it an appropriate place to raise nationwide claims about "the very activity being conducted, *in part*, in New Hampshire," although its New Hampshire

connections were not "so substantial as to support jurisdiction over a cause of action *unrelated to* those activities." *Id.* at 779-80 (emphasis added).

So too here. Petitioner's uniform, nationwide Plavix-related design, labeling, and marketing practices—directed "in part" into California—gave rise to respondents' claims along with those of the resident plaintiffs. Petitioner has never suggested, for example, that it engaged in *any* distinct marketing of Plavix in California, likely because federal regulation demands uniformity. U.S. Br. 24 n.3. And just as Hustler was aware of the "single publication rule" subjecting it to nationwide damages claims in New Hampshire, petitioner was aware here that it might be subjected to nationwide damages claims in California. *See* Pet. App. 33a (collecting California precedents).[11]

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[11] For understandable reasons, *Keeton* placed no weight on the fact that the litigation involved only one plaintiff. 465 U.S. at 780-81. The State's adjudicatory authority attaches to the defendant's *conduct*, not the plaintiff's identity. *Nicastro*, 564 U.S. at 882-84. In turn, whether the defendant may be fairly haled into a forum bears little relation to whether it faces claims by one person or several. In either case, the defendant must hire counsel, travel to the forum, and discover and litigate about the same facts, on pain of a default judgment in the same amount. At most, the *relative* number of plaintiffs from different states relates to the "reasonableness" inquiry—a point the California Supreme Court itself acknowledged, Pet. App. 35a-36a—but that question is conceded here.

The presence of a defendant like McKesson also makes this case dramatically different from others because McKesson is subject to general jurisdiction in California. While "[t]he requirements of *International Shoe* ... must be met as to each defendant," *Rush*, 444 U.S. at 332 (quoted at Br. 49), "[n]aturally, the parties' relationships with each other may be significant in evaluating their ties to the forum." *Id.* Here, *petitioner itself* decided to contract with McKesson to distribute billions of dollars in Plavix in both California *and other states*. The complaints allege that petitioner and McKesson were "co-conspirator[s]," J.A. 23, who together caused Plavix to be placed "into the stream of commerce .... in a defective and unreasonably dangerous condition." *Id.* 48. Discovery has revealed that McKesson sold astronomical amounts of Plavix around the country: over 700,000 pills *in one week* in 2008. Among other things, that means petitioner would have foreseen the possibility of claims against it by non-California residents in California, even under its own causal test.

As discussed, the identity of the residents' and non-residents' claims also plays an important role here, because it shows that they belong in one controversy or litigation. *See supra* at 6. "When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and *the litigation*' is the essential foundation of *in personam* jurisdiction." *Helicopteros*, 466 U.S. at 414. Importantly, all the plaintiffs in the litigation bring the same claims based on the same operative

facts. The non-residents' suits thus add no legal theories or discovery burdens, and leave untouched the scope of the state court's conceded jurisdiction over the residents' claims and petitioner's operative conduct. The overall shape of "the litigation" remains the same, and it is a litigation where the common "suit-related conduct" concededly "create[d] a substantial connection with the forum State." *Walden*, 134 S. Ct. at 1121.

If the plaintiffs' claims were differently structured, the minimum-contacts outcome would change. In particular, if petitioner marketed Plavix differently in different forums, respondents' claims would lack the intimate connection—through the same common nucleus of operative facts—that makes it appropriate for a court with personal jurisdiction to decide these claims together in a single case. But that can't be disputed here: After all, petitioner's initial complaint was that all these claims were *so intimately connected* that the federal courts should involuntarily merge them and take jurisdiction over the entire litigation under CAFA. *See supra* at 7-8.

Importantly, the foregoing shows that the requirements of due process cannot be evaded by a non-resident plaintiff artfully pleading that her complaint generically challenges the "nationwide marketing" of a product. *Contra* Br. 27 (suggesting jurisdiction will be available everywhere merely because plaintiffs say a product "looks just the same" in every state). The plaintiff has the "burden of establishing the trial court's jurisdiction," and the power of the court to decide her case. *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98

(1993). As with class-action allegations, courts must scrutinize the suggestion that the plaintiffs' claims are closely related and arise from common conduct directed, in part, into the forum state. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-52 (2011). And, helpfully, this will mirror the careful analysis already required to decide whether individual claims belong in one case for purposes of joinder, amendment, supplemental jurisdiction, *res judicata*, and the like. *Supra* at 31.

### B. Personal Jurisdiction In California Is Fair And Reasonable.

From the standpoint of "traditional notions of fair play and substantial justice," collecting these claims in one case is also straightforward. There is no question that they arise from a common core of uniform, nationwide conduct, as petitioner has conceded at various points. Meanwhile, petitioner has never even attempted to describe any prejudice resulting from aggregating the claims against it in California, except in the twisted sense that it hopes, otherwise, these claims might not be brought at all. In fact, it conceded that jurisdiction over this litigation in California was fair and reasonable if the minimum-contacts side of the inquiry was met. *See supra* at 10-11. Thus, while petitioner derides the decision to sue in California as "tactical," Br. 31, it has at no point identified even one aspect of California procedure that is unfair to it, or one respect in which the overlapping interests of other states cannot be accommodated through choice-of-law

rules or other "means short of finding jurisdiction unreasonable." *Burger King*, 471 U.S. at 478.

It is also obvious that it would cause no procedural unfairness to petitioner for the California courts to decide respondents' claims in this litigation. No matter whether respondents' own claims go forward, petitioner must litigate the same issues against the California residents, producing the same evidence and witnesses, trying the same core facts, and addressing the same core legal questions. Apart from making atomized claims too difficult or expensive to bring, there is no conceivable reason why petitioner—having already shouldered expensive discovery in California—would prefer to go through this and every other stage of litigation again in every state. That's particularly true because, again, the rules governing non-mutual offensive collateral estoppel will tend to make joint litigation the fairer option for the petitioner. *See supra* at 32-33.

Moreover, petitioner is litigating the indistinguishable California claims solely because petitioner itself chose to project the same, identical course of conduct regarding the identical product into multiple states. Here, too, *Keeton* is dispositive. This Court made clear in *Keeton* that it was fair to subject all the nationwide claims of injury to personal jurisdiction in New Hampshire "even though only a small portion of those copies were distributed in New Hampshire." 465 U.S. at 775. That concern, while present (and accounted for) here, *see* Pet. App. 36a-44a, is at least far more attenuated: California plaintiffs represented over 13% of the claims in these complaints, *far* above New Hampshire's small share

of Hustler's nationwide circulation.[12] Pet. App. 2a; *Keeton*, 465 U.S. at 775. Moreover, the Court deemed nationwide jurisdiction fair in *Keeton* even though it might have allowed the plaintiff to circumvent every other state's shorter statute of limitations—a concern that is absent here. *Id.* at 778-79.

To be sure, these are *real* concerns: Asserting personal jurisdiction over a case aggregating multi-state claims will often not be fair and reasonable based on case-specific circumstances. This would—quite appropriately—be a different case if it involved only a handful of California plaintiffs and hundreds from Texas or Tennessee. *Contra* Chamber of Commerce Br. 24-26. The key point is simply that, as the California Supreme Court recognized, it is the *reasonableness* inquiry that appropriately filters out such cases. Petitioner's argument depends on ignoring the work that inquiry does in order to cram

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[12] Petitioner's 1.1% statistic (at 7) is not forthright. As the court noted below, Pet. App. 5a, this compares nationwide revenue *for all products* to *Plavix-only* revenue in California. It also refers to the 12-month period ending in July 2012, *id.*, which includes several months after Plavix went off patent—leading to a massive drop (96%!) in petitioner's Plavix revenue. *See* Tracy Staton, *BMS Results Crater on 96% Drop in Plavix Sales*, FIERCEPHARMA.COM (Oct. 24, 2012), http://www.fiercepharma.com/financials/bms-results-crater-on-96-drop-plavix-sales. It is thus hardly surprising (or helpful to know) that California Plavix sales constituted a relatively small percentage of petitioner's total revenues over that (perhaps carefully chosen) period.

concerns about unreasonable exercises of jurisdiction into the justification for a bright-line, causal *relatedness* rule. *See* Pet. App. 35a-36a.

Less directly but still relevant from a fairness perspective, petitioner conducts very substantial operations in California. It has not only registered to do business there but also has hundreds of employees, many working to develop other drugs sold nationwide. Pet. App. 5a. Accordingly, petitioner would have foreseen California as a venue for multistate pharmaceutical claims, even under petitioner's own causal test, and would have expected to litigate frequently in California in general.

It is also noteworthy that petitioner's multiple California offices represent a huge amount of valuable in-state property; under "*traditional notions* of fair play and substantial justice," *see Burnham*, 495 U.S. at 616-22 (emphasis added), that property would easily have sufficed for satisfaction of respondents' claims through California's *in rem* jurisdiction. To be sure, doing such substantial in-state business cannot alter the minimum *relatedness* required for specific personal jurisdiction, *see supra* at 14-15 (critiquing this possible reading of the sliding-scale standard), but it can certainly render exercises of personal jurisdiction more reasonable overall.

The Due Process Clause also accounts for the weighty interests of the State in providing an adjudicatory forum, and here—as the California Supreme Court explained—the State has several significant interests in allowing its courts to decide

this joint case. As in *Keeton*, it seeks to collaborate with other states in the efficient resolution of suits regarding the same conduct that would otherwise be litigated in thirty different jurisdictions, wasting resources and risking inconsistent verdicts. Pet. App. 39a-41a. Moreover, as the California Supreme Court carefully explained, the injuries of the out-of-state plaintiffs are themselves important in correctly adjudicating the claims of the in-state plaintiffs, as they are highly probative evidence of these injuries' common cause. *Id.* 39a.

California also has a cognizable interest in ensuring the complete adjudication of claims arising from the wrongful conduct alleged by the residents' complaints—including the non-resident plaintiffs'. As a matter of basic tort principles, California seeks to ensure that petitioner internalizes all the costs of the uniform nationwide conduct that harmed its residents—a goal that is undermined the more that petitioner can evade liability to residents of other states. *Cf. BMW*, 517 U.S. at 602-03 (Scalia J., joined by Thomas, J. dissenting) (explaining that a state certainly could, consistent with federalism and due process, increase a defendant's liability in a case properly before it based on the out-of-forum injuries it caused—*even if the conduct was legal there*). Spreading the costs of the litigation across a greater number of plaintiffs also reduces the costs borne by California residents, making it more likely that the State can provide them an effective forum. *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 292 (acknowledging relevance of "the plaintiff's interest

in obtaining convenient and effective relief"); *see also Keeton*, 465 U.S. at 775-76 (same).

California has a further distinct interest in the fair and efficient disposition of claims against McKesson, a resident corporation. As discussed, petitioner would force McKesson to defend suits in every state court in which the plaintiffs reside, or force McKesson to defend joint claims against it in California—in petitioner's absence—when almost all the relevant conduct was petitioner's and almost all the relevant evidence is thus in petitioner's hands. That would substantially increase the costs of its defense and the possibility that it will be forced to chase down petitioner in yet further contribution litigation. There is no basis to read the Due Process Clause to require such an inefficient and burdensome "process" in place of one fair and efficient case.

## IV. There Is No Merit To Petitioner's Remaining Arguments.

In the end, petitioner's defense of its novel, claim-by-claim causation requirement amounts to a grab bag of policy arguments and carefully extracted pieces of dicta. None of its submissions remotely justify overturning the long-settled "related to" standard.

1. Petitioner's claim that its position is supported by precedent misstates this Court's decisions. In general, its argument amounts to artfully quoting dicta about sufficient conditions to make them seem necessary, and ignoring contrary formulations of the inquiry articulated in neighboring sentences of the very cases it cites.

This starts with *International Shoe* itself. Petitioner's brief (at 16) first cites "gives rise to" language from that case in isolation. And later, petitioner spends pages (at 20-22) explaining that the broad "related to" formulation only emerges decades later. But *International Shoe* in fact formulates the operative inquiry much more broadly, foreclosing only "causes of action *unconnected with* the [corporation's] activities" in the forum, 326 U.S. at 317 (emphasis added), as petitioner eventually concedes (at 17, 21). And, of course, it is that broader language that gets embraced in every subsequent decision, permitting litigation "arising from *or related to*"—or "disputes that 'arise out of or are *connected with*'"—"the [defendant's] activities within the state." *E.g.*, *Nicastro*, 564 U.S. 881 (plurality); *see supra* at 18-20.

Petitioner's dicta hunt through *Burger King* goes even further astray. Connecting language appearing pages apart, petitioner says that, there,

> the Court said "that specific jurisdiction is proper where the litigation results from alleged injuries that 'arise out of or relate to' th[e] [defendant's] activities in the forum State. And that connection exists, the Court explained, where the litigation seeks to hold a defendant "to account *** for *consequences that arise proximately* from such activities."

Br. 18 (petitioner's alterations). But, in its own context, the "proximate[]" language petitioner quotes is actually explaining only one of "*several reasons* why a forum legitimately may exercise personal

jurisdiction over a nonresident." *Burger King*, 471 U.S. at 474 (emphasis added). The *very next sentence* explains that, "in a State where [a defendant] engages in economic activity ... it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes *relating to* such activity." *Id.* (emphasis added).

*Hanson* gets even worse treatment. Petitioner says this Court "rejected" jurisdiction there "because the claims at issue did not 'arise[] out of an act done or transaction consummated in the forum.'" Br. 19 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). But, in context, the quoted language is just noting the absence of a condition deemed sufficient for jurisdiction in an earlier case; petitioner is the one who smuggles in the word "because." When *Hanson* identifies the operative point in the same paragraph, it finds against jurisdiction because "this action involves the validity of an agreement that was entered *without any connection* with the forum State." 357 U.S. at 252 (emphasis added).

"One could easily go on." Br. 19. Petitioner quotes *Walden* for the proposition that, for there to be specific jurisdiction, a "suit 'must arise out of [the defendant's] contacts *** with the forum state.'" Br. 21-22 (quoting 134 S. Ct. at 1122). Of course, *Walden*'s holding had nothing to do with such a rule. When *Walden* does describe the test, it uses much broader terms: "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* at 1121. That is unmistakably true here: Petitioner's marketing of $1

billion in Plavix pills in California is clearly "suit-related" and clearly "create[d] a substantial connection" with California. Having identified *this* as the "necessary relationship," *id.* at 1122, *Walden* uses the words petitioner (mis)quotes to say that this "*relationship*"—not "suit," Br. 21—must arise out of contacts that the defendant himself creates.

Ultimately, petitioner just admits (at 20-22) that its test will treat half of the Court's consistent formulations as surplusage—excusing all "related to" language as the kind of careless "legalese" common in the courts. But while "*an* opinion" might sometimes contain a piece of unintended dictum, *see* Br. 22 (quoting *Nevada v. Hicks*, 533 U.S. 353, 372 (2001)) (emphasis added), it is unheard of to see seven decades of opinions from multiple past and present Justices—and articulating an essential jurisdictional standard—all repeat the same formulations invariably when half of them are meaningless.

2. Petitioner also contends that finding specific jurisdiction in these circumstances amounts to an assertion of general jurisdiction, negating the Court's recent ruling in *Daimler*. That is obviously incorrect. No one thinks petitioner's Plavix-related activities in California support assertions of personal jurisdiction over *unrelated* issues. For example, plaintiffs cannot include other claims regarding other pharmaceuticals never marketed in California, or concerning Plavix marketed differently in Canada, or respecting BMS's human-rights violations in South Dakota (or South America), or the like. *See Daimler*, 134 S. Ct. at 751 (California complaint concerning Mercedes-Benz's conduct in Argentina's "Dirty War"). And even if the

relatedness inquiry allows the plaintiffs to proceed jointly, they must still show that personal jurisdiction over the whole litigation is fair and reasonable in California—an inquiry general jurisdiction does not require.

3. Petitioner further argues that basic principles of personal jurisdiction foreclose this suit because it "allow[s] a State to hale a defendant into court to enforce obligations that would have been 'incurred' regardless of whether the defendant enjoyed the privileges and benefits of the forum's laws." Br. 26. That sounds like a meaningful observation, but *Keeton* shows that it is not. There, too, New Hampshire enforced obligations against defamation in 49 other states that "would have been 'incurred' regardless of whether the defendant enjoyed the privileges and benefits of [New Hampshire's] laws." *Id.* The relevant point is that petitioner's uniform national conduct *in fact* touched New Hampshire, and there violated the same obligations it violated elsewhere. *Keeton*, 465 U.S. at 780. So too here: The conduct that injured respondents in their home states is the same "very activity being conducted, in part, in California," *id.*, and it is fair and appropriate for California to adjudicate the litigation about it because petitioner's actions created a large number of California plaintiffs, resulted in massive California sales of Plavix, and embraced a multi-state distribution relationship with California defendant McKesson.

Indeed, it is important to remember that, despite petitioner's efforts to depict them as an irrelevant happenstance, these California plaintiffs, defendants,

and facts are central to personal jurisdiction. Were they absent, there might still be minimum contacts, but California jurisdiction over this litigation would not be fair and reasonable.

4. Petitioner next argues that its proximate causation rule is clearer and more administrable, as it would give defendants greater certainty regarding where their conduct may give rise to suit. Br. 27-30, 44. That is incorrect. Among other things, the "related to" standard articulated here does not expand the number of jurisdictions in which a defendant is subject to suit. Litigation like this—asserting specific jurisdiction over cases aggregating claims "related to" the common, out-of-state conduct the defendant directed "in part" into the state—will necessarily proceed only in forums in which defendants already subjected the same conduct to that court's authority. *See supra* at 48-51.

It is true that petitioner's bright-line rule creates more certain *limits* on joint suits. (Whether it is a particularly clear rule is another matter, given the famous difficulties in determining whether a cause is legally "proximate.") But any bright-line rule can claim such one-sided benefits. The inquiry would be much more "certain" if the Court returned to the regime that provided bright-line blessings of state-court jurisdiction through in-state property or registered agents. Petitioner's quarrel is with the entire edifice of *International Shoe*. It cannot claim the benefit of rejecting the more-certain jurisdictional rules that would have cut against it before that transformative decision, and then deride the flexible, specific-jurisdiction standard that justified the

change. Similarly, it is both dangerous to established state-court procedures and risks grave injustices for this Court to rebalance the rules of general jurisdiction in reliance on that same flexible, specific-jurisdiction standard, *see Daimler*, 134 S. Ct. at 758 n.10, only to pull that rug out from under the law.

5. At very bottom, petitioner's argument repeatedly veers into a territorial concern that a forum like California will reflexively apply its own law to disputes arising in other jurisdictions. But this Court has repeatedly explained that such concerns about which state's substantive law should govern a plaintiff's claims are addressed through choice-of-law rules—including their constitutional limitations—rather than rendering the adjudication unconstitutional for lack of personal jurisdiction. *See, e.g.*, *Burger King*, 471 U.S. at 481-82; *Keeton*, 465 U.S. at 778. *Shutts* is the perfect example: It "reject[ed] petitioner's jurisdictional claim, but sustain[ed] its claim regarding the choice of law," and forced the Kansas courts to apply non-forum law to the non-forum claims it nonetheless had the power to adjudicate against the non-forum defendant. *See* 472 U.S. at 799. Don't be fooled by petitioner's deliberately telescopic focus; a wider and better-designed set of doctrinal tools is readily available—from the reasonableness inquiry to *forum non conveniens* to constitutional choice-of-law rules—to ensure that defendants are treated fairly when a single forum is asked to exercise its authority over multi-state claims against it in a single, efficient suit.

Here, the sole issue is whether a fair, reasonable, and efficient form of litigation for those claims—

which petitioner plainly connected to California by directing its uniform, nationwide "suit-related conduct" into that State—must be needlessly torn apart in the name of due process. The answer is no.

## CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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March 31, 2017

No. 16-466

IN THE
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*Respondents*.

On Writ of Certiorari to the
California Supreme Court

## REPLY BRIEF FOR PETITIONER


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## RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the opening brief for petitioner remains accurate.

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## REPLY BRIEF FOR PETITIONER

## INTRODUCTION

Respondents do not defend the California Supreme Court's sliding-scale approach. Nor, for that matter, do they defend any other personal-jurisdiction test that any court has ever articulated.

Instead, respondents urge the Court to adopt an entirely novel personal-jurisdiction rule, one jerry-rigged to fit the facts of this case. Depending on which page of their brief one opens, respondents' test turns on which plaintiffs choose to file together, how many defendants they append to their complaint, the similarity of the defendants' conduct across States, or some subset of those factors. The exact details are unclear; but whatever their rule, respondents are

sure that the sky will fall several times over if the Court does not adopt it.

That argument is as implausible as it sounds. For decades, the large majority of circuits, covering 37 States, have held that plaintiffs may sue a non-resident defendant only where some conduct giving rise to their claims was performed or directed. That jurisdictional rule is fair, follows from this Court's precedents, and has not caused any of the dire consequences of which respondents warn. Respondents' rule, by contrast, lacks any footing in precedent and would inject uncertainty into what should be a predictable standard.

The Court does not need to upend the law or "overrule *International Shoe* and its progeny," Resp. Br. 36 n.7, to resolve this case. Plavix was not developed or manufactured in California; it was not marketed, distributed, or prescribed to respondents in the State; and respondents did not ingest the drug in California either. Respondents do not dispute that their particular claims lack any causal connection to anything that Bristol-Myers did in California. California is therefore not a proper forum to hear their causes of action. The California Supreme Court's judgment should be reversed.

## ARGUMENT

### I. RESPONDENTS OFFER NO BASIS FOR REJECTING A CAUSAL TEST

#### A. The Court's Precedents Dictate A Causal Test

1. In every case since *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), in which the Court has found specific jurisdiction, it has identified a

causal link between the defendant's forum contacts and the plaintiff's cause of action. Pet. Br. 17-19. And in every case since *International Shoe* in which the Court has found specific jurisdiction lacking, it has noted the absence of such a causal link. *Id.* at 19-20. The Court's recent pronouncements in *Goodyear* and *Daimler* are the culmination of these precedents: There, the Court held that if an "accident" occurred outside the forum, and the product that "caused the accident was manufactured and sold" outside the forum, the forum "lack[s] specific jurisdiction to adjudicate the controversy." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919 (2011); *see Daimler AG* v. *Bauman*, 134 S. Ct. 746, 751, 754 n.5 (2014) (similar). That straightforward principle decides this case. *Accord* U.S. Br. 11.

Respondents do not grapple with the facts or holdings of the vast majority of these cases. Nor do they explain how their freewheeling test squares with the clear rule this Court articulated in *Goodyear* and *Daimler*. Rather, respondents' main contention (at 18-19) is that because the Court has used the disjunctive phrase "arise out of *or* relate to," it *must* have intended to establish two categories of connections that could support specific jurisdiction. But when the Court first adopted that formulation, it "decline[d]" to decide "whether the terms 'arising out of' and 'related to' describe different connections." *Helicopteros Nacionales de Colombia* v. *Hall*, 466 U.S. 408, 415 n.10 (1984). Similar two-part formulations appear throughout the law, without anyone attributing a different meaning to each part: "arbitrary or capricious," for instance, or—to pick an example closer to home—"fair play and substantial

justice." *International Shoe*, 326 U.S. at 316; *see* Pet. Br. 22. "Arise out of or relate to" is best understood as just another example—especially given the notorious indeterminacy of the words "related to." *See Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1990 (2015) (the words "relating to" are " 'broad' and 'indeterminate' "); *Maracich* v. *Spears*, 133 S. Ct. 2191, 2200 (2013) (" 'everything is related to everything else' ").

Respondents also argue (at 19) that no case says personal jurisdiction is a claim-specific analysis. Actually, plenty of cases say that. *International Shoe* itself held that plaintiffs may not "su[e] on *causes of action* unconnected with [a defendant's] activities" in the forum. 326 U.S. at 317 (emphasis added); *see id.* at 318 (similar). Subsequent opinions have reiterated that the specific-jurisdiction inquiry requires courts to examine "the particular cause of action" at issue, *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980); to find a "relationship between the cause of action and [the defendant's] contacts," *Helicopteros*, 466 U.S. at 415 n.10; and to adjudicate only those "cause[s] of action arising out of the corporation's activities within the state of the forum," *Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437, 444-445 (1952); *see also Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) (similar); *Kulko* v. *Superior Court*, 436 U.S. 84, 97 (1978) (similar); *Shaffer* v. *Heitner*, 433 U.S. 186, 209 (1977) (similar); *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958) (similar). Indeed, every court of appeals to consider the issue has agreed that "specific personal jurisdiction must independently exist for each claim and the existence of personal jurisdiction for one claim will not provide the basis for another claim." 5B Charles Alan Wright et al., *Federal Practice & Procedure* § 1351

n.30 (3d ed. Apr. 2017 update), *quoted in Seiferth* v. *Helicopteros Atuneros, Inc.*, 472 F.3d 266, 275 n.6 (5th Cir. 2006); *see, e.g.*, *Picot* v. *Weston*, 780 F.3d 1206, 1215 n.3 (9th Cir. 2015); *Sunward Elecs., Inc.* v. *McDonald*, 362 F.3d 17, 24 (2d Cir. 2004).

Respondents thus err in asserting that a connection between the defendant and any part of the "litigation" suffices. The Court has made clear that a contact "completely unrelated to the plaintiff's cause of action" fails to establish the requisite "ties among the defendant, the State, and the litigation." *Shaffer*, 433 U.S. at 208-209. *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102 (1987), proves the point: There, the Court considered whether California had jurisdiction to "adjudicat[e] [a] Taiwanese company's *cross-complaint*" for indemnification, even though the State's jurisdiction over the underlying cause of action was undisputed. *Goodyear*, 564 U.S. at 925 (emphasis added); *see Asahi*, 480 U.S. at 114.

2. Respondents contend that *Keeton* refutes these principles. It does not. In that case, Keeton brought a libel claim in New Hampshire against a defendant who distributed thousands of copies of an allegedly libelous magazine in the forum and other States. 465 U.S. at 772. The Court found that "all the requisites for personal jurisdiction" were "unquestionabl[y]" satisfied in light of a causal link between the defendant's forum contacts and Keeton's claim: The defendant had engaged in "regular circulation of magazines in the forum State," and Keeton's "libel action [was] based on the contents of the magazine." *Id.* at 773-774.

The only question before the Court was whether Keeton's suit was nevertheless so "unfair" as to

"defeat jurisdiction otherwise proper." *Id.* at 773, 775. The Court said no. Because New Hampshire had jurisdiction over Keeton's cause of action, it could award her all of the "damages" that its substantive law authorized. *Id.* at 773-774. And New Hampshire law, like the law of most other States, authorized plaintiffs to bring "only one action" for a libel reprinted in multiple copies of a single publication, and to recover "all damages suffered in all jurisdictions * * * in the one action." *Id.* at 773 n.2, 777 n.8. Because that "single publication rule" was both efficient and known to anyone conducting business in the forum, the Court held there was "no unfairness" in applying it to the defendant. *Id.* at 777-778, 781.

*Keeton* thus stands for two propositions, neither helpful to respondents. *First*, a court may exercise jurisdiction "when the [plaintiff's] cause of action arises out of * * * activity being conducted, in part, in [the forum]." *Id.* at 780. *Second*, once jurisdiction over the cause of action has been established, a plaintiff may seek the full "damages" authorized by the State's substantive law, even if those damages are calculated in part by looking to the defendant's out-of-state conduct. *Id.* at 778 n.9, 781. Contrary to respondents' repeated mischaracterization (at 24-26, 48-49, 61), the Court did not permit New Hampshire to exercise specific jurisdiction over multiple "claims" or to enforce multiple "obligations," only some of which were causally linked to the State. It allowed *one* plaintiff to bring *one* claim arising out of the forum, and to seek full damages for that claim permitted by substantive law. The Court did not authorize a State to assert jurisdiction over *different*

plaintiffs asserting *different* claims lacking *any* causal link to the forum.

3. Respondents (at 27) also rely on *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), but that decision is even farther afield. As respondents ultimately acknowledge (at 28 n.6), *Shutts* concerned whether "specific jurisdiction was fairly asserted over the non-resident *plaintiffs*" in a nationwide class action. (Emphasis added.) At issue was the connection between the absent plaintiffs and the forum—not the connection between the defendant's forum contacts and the litigation. *See* 472 U.S. at 806. So *Shutts* says nothing about the question presented here.

Respondents nevertheless insist (at 28 n.6) that the state court's exercise of jurisdiction in *Shutts* would have been proper even if the defendant had "invoked its *own* due-process rights, rather than those of the non-resident plaintiffs."[1] But the entire point of *Shutts* was that the due-process analysis is different depending on whether the plaintiff's or defendant's rights are at issue. *See* 472 U.S. at 806-812.

4. Unable to find support in any of this Court's precedents, respondents candidly identify their real problem as *International Shoe* itself. Respondents thus urge the Court to revert to the regime set forth

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[1] The defendant in *Shutts* presumably did not invoke its own due-process rights because of Kansas's pre-*Daimler* "doing business" standard for *general* jurisdiction. *See Shutts* v. *Phillips Petroleum Co.*, 567 P.2d 1292, 1304 (Kan. 1977) (holding, in an earlier class action, that the same defendant "does business in Kansas," and noting that "the jurisdiction of the trial court over the defendant" was undisputed).

in *Pennoyer* v. *Neff*, 95 U.S. 714 (1877)—and to "overrule *International Shoe* and its progeny" to the extent they stand in the way. Resp. Br. 33-36 & n.7.

The Court should decline. Opinion after opinion has adhered to *International Shoe*'s framework without a word of dissent. *See, e.g.*, *Walden* v. *Fiore*, 134 S. Ct. 1115, 1121 (2014); *Daimler*, 134 S. Ct. at 753-754; *Shaffer*, 433 U.S. at 196-206. And as Justice Scalia has explained, the "rigid [territorial] requirement[s]" of *Pennoyer* were based on "purely fictional" notions of "consent and presence." *Burnham* v. *Superior Court*, 495 U.S. 604, 617-618 (1990) (plurality opinion). *International Shoe* "cast those fictions aside and made explicit the *underlying basis* of th[o]se decisions." *Id.* at 618 (emphasis added). Reviving *Pennoyer*'s imperfect fictions would do nothing to respect the foundations of the Court's due-process jurisprudence.

### B. The Structure And Purposes Of The Specific-Jurisdiction Inquiry Require A Causal Test

Respondents barely contest the remaining rationales supporting a causal test: harmonizing the different parts of the specific-jurisdiction analysis and advancing the principles of federalism, predictability, and fairness.

1. *Structure.* Respondents do not dispute that the *first* link in the specific-jurisdiction inquiry—between the defendant and the forum—requires a causal relationship. Pet. Br. 23, 40-41. They offer no reason why a lesser connection is sufficient to establish the *second* link—between the forum and the plaintiff's cause of action. A non-causal test for the second link would allow the plaintiff to hale a de-

fendant into court based on "random, fortuitous, or attenuated" connections between the forum and the plaintiff's claims—such as a plaintiff's "unilateral activity" in choosing to sue alongside another plaintiff whose claim *is* causally linked to the defendant's forum contacts. *Walden*, 134 S. Ct. at 1123 (internal quotation marks omitted). The Court has repeatedly held that such randomness should not infect the purposeful-availment inquiry, and the arise-out-of-or-relate-to analysis should be subject to the same standard.

2. *Federalism.* Respondents do not dispute that the obligations Bristol-Myers allegedly owes them were incurred outside California. They simply say (at 22) that personal jurisdiction does not necessarily give a State authority to apply its own substantive laws. But if that were truly dispositive, there would be no principle of reciprocity animating this Court's specific-jurisdiction decisions. Pet. Br. 25-27; *see World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 294 (1980) (describing the Due Process Clause "as an instrument of interstate federalism" in the personal-jurisdiction context). Respondents also overlook that California would have to apply 33 other States' unfamiliar law—a situation less than ideal. GlaxoSmithKline Br. 20-22.

In addition, respondents ignore that the "power * * * to resolve disputes" is "no less" a component of sovereign authority than "the power * * * to prescribe rules of conduct." *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 879 (2011) (plurality opinion). Indeed, a forum with adjudicatory authority applies its own *procedural* rules to the dispute. *See Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 723, 729-730 (1988).

And procedure often makes a substantive difference. *See* Pet. Br. 29-30; DRI Br. 12-15. As the Court has recognized in other contexts, considerations of "federalism and comity" demand respect for the "procedural rules" of the appropriate forum. *Beard* v. *Kindler*, 558 U.S. 53, 62 (2009); *see Coleman* v. *Thompson*, 501 U.S. 722, 726, 750 (1991). Here, an appropriate forum is a place where some conduct giving rise to respondents' claims occurred; California cannot "tread on the domain" of its "sister State[s]" by seizing authority to decide respondents' claims itself. *Nicastro*, 564 U.S. at 899 (Ginsburg, J., dissenting).

3. *Predictability.* Respondents suggest (at 22-23, 62) that it is enough that defendants can predict that they will be subject to *some* litigation in each forum where they have contacts. But to receive the "fair warning" to which due process entitles them, potential defendants need to know the *extent* of their exposure in a forum, *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985), so that they can procure appropriate "insurance," set "costs" for their products, and manage the extent of their "connection with [a] State." *World-Wide Volkswagen*, 444 U.S. at 297. Only a causal test provides defendants this fair notice. *See* Pet. Br. 27-30; Chamber Br. 20-23; PhRMA Br. 25; PLAC Br. 11-12. Absent a causal requirement, a defendant selling a product nationally can only guess where it will be sued for any particular conduct; if sales to others in a forum are "related" forum contacts, each allegedly injured person could sue anywhere. U.S. Br. 32-33.

4. *Fairness.* Finally, requiring a defendant to litigate far from where the underlying acts took place

makes it more difficult for the defendant to gather relevant evidence, subpoena necessary witnesses, and mount a convincing defense. Pet. Br. 30-31. Respondents do not acknowledge any of these costs; nor do they identify any legitimate interests of States or plaintiffs in adjudicating suits where none of the conduct underlying the claim occurred. Respondents' assumption (at 23, 52-53) that so long as a defendant is litigating one claim in a forum, it is fair to make it litigate all of them there is not due process in any sense.[2]

## II. RESPONDENTS' NON-CAUSAL TEST IS NOT SUPPORTED BY THIS COURT'S CASES OR COMMON SENSE

Respondents' brief, surprisingly, jettisons any defense of the California Supreme Court's sliding-scale test and instead offers an even broader non-causal test that respondents made up themselves. Respondents do not suggest that any court has ever described, endorsed, or applied their test. Unlike California's test, theirs does not depend at all on the intensity of the defendant's contacts with the forum. *See* Resp. Br. 14-15 (California's test "is not exactly right"). Instead, respondents apparently believe that, regardless of the intensity of a defendant's contacts with the forum, a plaintiff can always satisfy the arise-out-of-or-relate-to requirement if the

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[2] Respondents (at 8) take out of context Bristol-Myers's counsel's statement below that some plaintiffs' cases would not be filed if jurisdiction were defeated. In context, counsel was saying that if plaintiffs' attorneys were not able to bring claims unconnected to California in the State, those claims would not be filed "in mass numbers to get leverage for some sort of future settlement." Cal. Ct. App. Oral Arg. Recording at 23:30.

conduct that allegedly harmed the plaintiff is similar to *other* conduct by the defendant there. Given that most States interpret their long-arm statutes as coextensive with due process, *see Nicastro*, 564 U.S. at 903 n.8 (Ginsburg, J., dissenting), respondents' test would give courts across the country sweeping jurisdictional reach. Respondents' test, however, is unmoored from this Court's cases and common sense.

1. Respondents identify three circumstances that they assert can justify specific jurisdiction when there is no causal link between the defendant's in-forum activities and a plaintiff's cause of action: (1) some other plaintiff in the case is asserting a claim that is causally linked to the defendant's forum contacts; (2) some other defendant in the case is subject to personal jurisdiction in the forum; and (3) the plaintiff's claims are based on conduct similar to conduct that the defendant directed at the forum. Resp. Br. 2-3. None of these factors, alone or in combination—and respondents never quite settle on whether their rule requires some or all of them, *compare, e.g.*, *id.* at 17-18, *with id.* at 61-62—are constitutionally sufficient for a forum to hale a defendant into court to answer claims not causally linked to the defendant's forum contacts. Just the contrary: Each of respondents' supposedly limiting principles is contrary to case law and the principles of specific jurisdiction.

a. Any reliance on the presence of co-plaintiffs runs headlong into *Walden*. *Id.* at 22-23. There, the Court held that a plaintiff's unilateral decisions do not inform whether specific jurisdiction over a defendant comports with due process. 134 S. Ct. at 1123. The plaintiffs named in a complaint is just

such a unilateral decision; a defendant has no control over it. Pet. Br. 49-50. And it makes no sense that two people, prescribed Plavix in two different States, can subject a defendant to specific jurisdiction in either State if they sue together, but not if they sue separately. *See Walden*, 134 S. Ct. at 1122 ("it is the defendant's conduct that must form the necessary connection").

At points, respondents (at 21, 62) go even further, suggesting that there need only be a *hypothetical* co-plaintiff with causally linked claims. If that were correct, a single forum contact could result in an unlimited number of claims in that forum: By selling a single Plavix pill in Nebraska, for example, every plaintiff in the country asserting claims about Plavix could sue Bristol-Myers in Nebraska. That result—which not even the California Supreme Court endorsed, *see* Pet. App. 32a-33a—would essentially turn *every* State into Bristol-Myers's "home" for Plavix claims, "elid[ing] the essential difference between case-specific and all-purpose (general) jurisdiction." *Goodyear*, 564 U.S. at 924, 927.

Respondents' contention (at 23) that such a rule brings predictability blinks reality. Respondents' test allows any Plavix plaintiff to sue anywhere Plavix is distributed. Bristol-Myers has no way to predict whether Plavix claims will be aggregated into litigation in a few forums, or whether patients prescribed Plavix in West Virginia will sue in Texas, those in Texas will sue in Ohio, and so on. For corporations like Bristol-Myers, "act[ing] to alleviate the risk of burdensome litigation by procuring insurance [or] passing the expected costs on to customers," *World-Wide Volkswagen*, 444 U.S. at 297, it matters

whether individual plaintiffs from around the country can flock to States with plaintiff-friendly procedural rules or historically generous juries. *See* Pet. Br. 4; GlaxoSmithKline Br. 7-14. Moreover, because there is no obligation to file in any particular jurisdiction under respondents' rule, the supposed streamlining benefits are illusory. U.S. Br. 32-33. Defendants would have no way to anticipate the extent of liability in any given forum, diminishing the predictability that is so "valuable to corporations making business and investment decisions." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010).[3]

b. Respondents' next suggestion—that personal jurisdiction over one co-defendant makes jurisdiction over another co-defendant proper—is equally wrong. Respondents (at 2, 5, 39-40, 50) repeatedly cite McKesson's role to justify specific jurisdiction over Bristol-Myers. But *Rush* held that a court cannot lump "the 'defending parties' together and aggregat[e] their forum contacts in determining whether it ha[s] jurisdiction." 444 U.S. at 331. Personal jurisdiction "must be met as to each defendant." *Id.* at 332.

Respondents reply that, under *Rush*, "the parties' relationships with each other may be significant in evaluating their ties to the forum." Resp. Br. 50 (quoting *Rush*, 444 U.S. at 332). But all that means is that the defendants' contacts with each other may, in some cases, be forum contacts. *See Walden*, 134

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[3] It does not matter how long California has followed a non-causal rule. *Contra* Resp. Br. 39. No defendant should be expected to predict that a State will exercise jurisdiction beyond federal constitutional limits.

S. Ct. at 1123. Here, however, even if Bristol-Myers's relationship with McKesson is a California contact, it has no relevance to *respondents'* claims. Respondents conceded below that there is no evidence that they received Plavix distributed by McKesson from California. *See* Pet. App. 59a-60a (Werdegar, J., dissenting).

c. That leaves respondents' reliance on Bristol-Myers's allegedly similar Plavix sales and marketing practices. Resp. Br. 1, 2, 4, 47, 52, 56, 64. But respondents never say why it is fair, predictable, or consistent with federalism that California can make itself the arbiter of such practices in 49 other States. They also offer no explanation for how courts should ascertain whether marketing practices are sufficiently similar to overcome the lack of a causal link—does it depend on identical ad copy in each State, identical marketing channels, scripted sales pitches, or something else entirely?

And that is just the tip of the iceberg. Respondents maintain (at 23) that under their test, the "required 'connection' * * * exists only where the claims of the non-forum residents track those of the residents on both the operative facts and relevant law." But it is not even clear that respondents' own claims satisfy that test. Though their complaints are "materially identical" on their face, Pet. Br. 4 n.1, a host of individualized issues lurk underneath the surface, with respect to both the facts (like whether their alleged injuries actually resulted from taking Plavix) and the law (like which State's legal standards apply and what those standards entail). *Id.* at 5.

Respondents hint (at 52) that they are proposing a similarity standard akin to class certification. But if

that is the case, then what respondents are offering is a "[c]omplex jurisdictional test[]" that will "eat[] up time and money as parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz*, 559 U.S. at 94. And trial courts will be forced to confront intensely factual questions at the threshold of a case, undermining "the efficient disposition of an issue that should be resolved expeditiously." *Daimler*, 134 S. Ct. at 762 n.20.

2. Neither of the backstops that respondents offer makes their test any more palatable.

*First*, respondents invoke—eight times—a separate reasonableness inquiry to avoid the problems their test creates. Resp. Br. 20, 22, 36, 37, 49 n.11, 54-55, 61-62, 63. But this Court has never treated that inquiry as a "core aspect" of the personal-jurisdiction analysis. *Id.* at 14. Rather, the Court has explained that it is the purposeful-availment and arise-out-of-or-relate-to requirements that "give specific content to the 'fair play and substantial justice' concept." *Goodyear*, 564 U.S. at 923. When those two requirements are met, a separate reasonableness inquiry operates merely as a safety valve to allow a defendant to argue that "the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477; *see also Daimler*, 134 S. Ct. at 762 n.20. As a result, only in "rare cases" do "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." *Asahi*, 480 U.S. at 116 (Brennan, J., concurring in part and in the judgment) (brackets

in original) (some internal quotation marks omitted); *see also* 4 Wright et al., *supra*, § 1067.2 (4th ed. Apr. 2017 update) (even with the reasonableness safety valve, "the existence of minimum contacts still constitutes the central query"). Indeed, *Asahi* is the *only* case in which the Court has found jurisdiction unreasonable in the face of a causal link between the defendant, the forum, and the cause of action. 480 U.S. at 113-116.[4]

That respondents must repeatedly invoke a stand-alone reasonableness inquiry to make their non-causal test workable proves just how unsound their test is. The Court has invested so heavily in articulating the purposeful-availment and arise-out-of-or-relate-to requirements because those requirements are meant to be the end of the inquiry in all but outlier situations. Placing the weight respondents do on a free-floating totality-of-the-circumstances reasonableness assessment would undermine predictability and fairness for defendants. *See Vieth* v. *Jubelirer*, 541 U.S. 267, 291 (2004) (plurality opinion) ("'Fairness' does not seem to us a judicially manageable standard.").

*Second*, respondents (at 37) point to *forum non conveniens* principles as another "tool[]" to "alleviate possible unfairness." But *forum non conveniens* does not "implicate[] constitutional due process rights,"

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[4] In the California Supreme Court, Bristol-Myers declined to argue that this was an extraordinary case requiring a *separate* reasonableness inquiry, but that was only because the lack of the required connection between its California contacts and respondents' claims was enough to render jurisdiction contrary to due process. *See* Pet. App. 35a-36a; Cert Reply Br. 12-13.

*Islamic Republic of Iran* v. *Pahlavi*, 467 N.E.2d 245, 250 (N.Y. 1984), so there is no constitutional requirement that state courts adhere to traditional *forum non conveniens* doctrines or any *forum non conveniens* doctrine at all. *See Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 145 (1988).

In the end, respondents appear (at 15-17) to view *Daimler*'s statement that specific jurisdiction has "flourished" since *International Shoe* as a way to smuggle in old general-jurisdiction results under a new specific-jurisdiction label. But the Court warned over 50 years ago that the "flexible standard" of *International Shoe* does not "herald[] the eventual demise of all restrictions on the personal jurisdiction of state courts." *Hanson*, 357 U.S. at 251. Respondents' unsupported test bends *International Shoe* beyond its breaking point.

## III. A CAUSAL TEST WOULD NOT UPEND SETTLED JUDICIAL PRACTICES

Respondents foresee a parade of horribles that would follow a holding that specific jurisdiction requires a causal connection. This Court has rejected similar doomsaying before. *See Walden*, 134 S. Ct. at 1125 n.9. Here, at least eight federal courts of appeals covering 37 States, as well as the majority of state high courts to have addressed the issue, already require a causal connection. *See* Pet. 10-15. And those jurisdictions have escaped respondents' apocalypse. That alone refutes respondents' contention (at 15) that a causal test would upend "settled practices." In any event, respondents' fears are unfounded.

1. Respondents first warn (at 29-30) that a causal requirement would prevent a plaintiff from bringing

multiple "claims" against a defendant in any jurisdiction except the defendant's home. Respondents offer the example of a Nevada company whose "manufacturing negligence" in Nevada causes it to fail to deliver goods to another company in Nevada and California. According to respondents, a causal requirement would prevent the injured company from bringing a single suit in California.

Not true. Respondents' hypothetical does not involve multiple "claims" at all. Rather, it involves a single cause of action for "negligence." That cause of action arises (in part) out of the defendant's contacts with California (where the defendant failed to deliver goods), so the California court may exercise specific jurisdiction over the cause of action. Whether the California court may award damages for harms suffered in both Nevada and California is "a matter of substantive law, not personal jurisdiction"—just as in *Keeton*. 465 U.S. at 778 n.9; *Restatement (Second) of Torts* § 910 (1979) ("One injured by the tort of another is entitled to recover damages from the other for all harm * * * legally caused by the tort.").

A causal requirement thus limits where a cause of action may be heard, but it does not limit what remedies may be recovered. Whether the plaintiff's cause of action is for libel, negligence, copyright infringement, or something else, the principle is the same: So long as the cause of action arises (even in part) out of the defendant's forum contacts, the causal requirement is satisfied. *See Keeton*, 465 U.S. at 780. And once specific jurisdiction over the defendant on the cause of action is established, the

forum may award whatever remedies the applicable substantive law permits. *See id.* at 778 n.9.

2. Respondents next contend that a causal requirement would essentially make it "impossible" for a plaintiff to bring a single suit against "multiple defendants that do not share a home forum." Resp. Br. 39. But if "multiple defendants" have in fact engaged in "identical wrongful conduct," *id.*, there will be plenty of jurisdictions where they can be sued together under a causal test—such as where they jointly distributed or jointly marketed a product. Even under respondents' test, the requirements of specific jurisdiction would still have to "be met as to each defendant." *Rush*, 444 U.S. at 332. And the fact that multiple defendants were involved in the "same controversy," Resp. Br. 40, cannot overcome that rule. If respondents believe it should be easier to sue multiple defendants together, their real quarrel is with *Rush*—not any causal requirement.

3. Respondents also warn (at 40-41) that a causal requirement could jeopardize a state court's authority "to probate an estate by resolving all claims against it." Probate, however, is a proceeding *in rem*, *In re Estate of Zagaria*, 997 N.E.2d 913, 919 (Ill. App. Ct. 2013), based not on the court's "authority over the defendant's person," but rather on its "power over property within its territory," *Shaffer*, 433 U.S. at 199. And though the "minimum-contacts standard" applies to *in rem* and *in personam* proceedings alike, this Court has said that "when claims to the property itself are the source of the underlying controversy * * *, it would be unusual for the State where the property is located not to have jurisdiction." *Id.* at 207. That is, it would be unusual for

such a claim not to arise out of the property within the State.[5]

4. Respondents further argue that a causal requirement would be inconsistent with various aspects of federal litigation. That is incorrect.

According to respondents (at 44), a causal requirement would invalidate federal provisions authorizing "nationwide [personal] jurisdiction" in federal courts. But those provisions rest on the understanding that, under the Fifth Amendment, a federal court may exercise personal jurisdiction "based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits." *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987). The Court here need not decide whether that is correct. *See* Pet. Br. 17 n.4; U.S. Br. 31 n.4. But if it is, a plaintiff's claim would merely have to arise out of a defendant's contacts anywhere in the United States—a requirement often satisfied.

Respondents also suggest (at 43) that a causal requirement "would render unconstitutional federal multi-state class actions and the entire federal multidistrict litigation scheme." But again, the constitutionality of those schemes is a Fifth Amendment question, not presented here. *See In re "Agent*

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[5] Many family-law cases, like marriage-dissolution actions and child-custody disputes, are adjudications of status, which courts have understood to be excepted from the minimum-contacts standard under *Shaffer*, 433 U.S. at 208 n.30. *See, e.g.*, *Henderson* v. *Henderson*, 818 A.2d 669, 674 & n.4 (R.I. 2003) (per curiam); *Balestrieri* v. *Maliska*, 622 So.2d 561, 563 (Fla. Dist. Ct. App. 1993).

*Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987).

With respect to class actions, moreover, this Court has not decided whether the specific-jurisdiction analysis should consider the claims of all class members or just those of named class representatives. *See* U.S. Br. 32 n.5; *Devlin* v. *Scardelletti*, 536 U.S. 1, 9-14 (2002) (explaining that unnamed class members "may be parties for some purposes and not for others"). And even if unnamed class members were treated as parties for the specific-jurisdiction analysis, a class action could always be brought in the State where the defendant is at home or in the State where the defendant undertook conduct giving rise to the plaintiff's claims.

Respondents' concerns about the federal MDL statute are similarly off-base. Respondents (at 43) appear to think that the "MDL court"—the *transferee* forum—must have a "causative connection" to the plaintiffs' claims. But in an MDL proceeding, it is the personal jurisdiction of the *transferor* court that matters. *See In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576, 583 n.8 (5th Cir. 2014).

Respondents (at 45) also point to "circumstances in which federal courts extend their adjudicatory power over claims they could not independently reach" by exercising supplemental jurisdiction, pendent-party jurisdiction, or minimal-diversity jurisdiction. But those doctrines expand a federal court's *subject-matter* jurisdiction within the limits of *Article III*. None has anything to do with a state court's exercise of personal jurisdiction under the Fourteenth Amendment. Even respondents' reliance (at 31, 46)

on the doctrine of "pendent personal jurisdiction" is misplaced. That is a doctrine of "federal common law," which allows a federal court to exercise personal jurisdiction beyond that permitted by Federal Rule of Civil Procedure 4(k)(1)(A) but still within the limits of the Fifth Amendment. 4A Wright et al., *supra*, § 1069.7 (4th ed. Apr. 2017 update). The doctrine has no application in state courts, and it is no exception to the rule that *each* cause of action must satisfy the constitutional requirements of personal jurisdiction.

5. Finally, respondents contend (at 31-32) that excluding certain plaintiffs from the specific jurisdiction of a particular court will lead to "wasteful" fights about the collateral-estoppel effect of "favorable" judgments. But no rule—not even respondents'—can guarantee that all possible plaintiffs will sue together in a single suit. This case proves the point: Notwithstanding California's non-causal standard, Bristol-Myers was sued—often by respondents' same counsel—not just in California but also in New York, New Jersey, Delaware, and Illinois. *See* Pet. Br. 50-51; *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.*, 923 F. Supp. 2d 1376, 1378 (J.P.M.L. 2013); Joint Case Management Conference Statement 1, *Plavix Prod. & Mktg. Cases*, JCCP No. 4748 (Cal. Super. Ct. June 1, 2016). Respondents' rule would thus do nothing to prevent the invocation of collateral estoppel in different suits.

In any event, it is far from clear that collateral estoppel has much relevance to products-liability suits. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326, 331-332 (1979) (doctrine applies only when there are "identical" issues and no "inconsistent"

judgments); *Coburn* v. *SmithKline Beecham Corp.*, 174 F. Supp. 2d 1235, 1237-1241 (D. Utah 2001) (declining to apply doctrine in products-liability case); Alison Kennamer, *Issues Raised by the Potential Application of Non-Mutual Offensive Collateral Estoppel in Texas Products Liability Cases*, 30 Tex. Tech L. Rev. 1127, 1155 (1999) ("the vast majority of courts that have considered the issue of non-mutual offensive collateral estoppel in the context of products liability litigation have chosen not to apply the doctrine"). And to the extent a defendant finds having to litigate in multiple jurisdictions unfair, it could simply consent to a single forum's exercise of personal jurisdiction.

## CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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APRIL 2017

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 16-466

# In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY, PETITIONER

*v.*

SUPERIOR COURT OF CALIFORNIA,
SAN FRANCISCO COUNTY, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE SUPREME COURT OF CALIFORNIA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether California courts have specific jurisdiction to adjudicate claims of out-of-state plaintiffs against an out-of-state defendant arising from acts outside of California that are alleged to have resulted in injuries outside of California.

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# In the Supreme Court of the United States

No. 16-466

BRISTOL-MYERS SQUIBB COMPANY, PETITIONER

*v.*

SUPERIOR COURT OF CALIFORNIA,
SAN FRANCISCO COUNTY, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE SUPREME COURT OF CALIFORNIA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

### INTEREST OF THE UNITED STATES

This case concerns the limits that the Due Process Clause of the Fourteenth Amendment places on state courts' jurisdiction over out-of-state companies. Congress has generally provided that federal courts may exercise "the jurisdiction of a court of general jurisdiction in the state where the district court is located," Fed. R. Civ. P. 4(k)(1)(A). Accordingly, the Fourteenth Amendment's limitations on state court jurisdiction also often constrain the jurisdiction of federal courts.

The United States has an interest in ensuring the existence of fair and efficient forums to adjudicate claims against foreign and domestic companies, including claims that the United States itself brings in federal court under federal statutes.

The United States also has an interest in avoiding state exercises of jurisdiction that are unduly expansive or unpredictable, because those exercises of jurisdiction pose risks for foreign and interstate commerce. Some companies may be reluctant to undertake or expand commercial activity within the United States when they cannot predict the jurisdictional consequences of their commercial or investment activity. In addition, some enterprises may be reluctant to invest or do business in particular States if participation requires them to answer in the State for conduct that occurs outside the State's boundaries.

## STATEMENT

1. "The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 923 (2011). Those boundaries have changed over time in response to commercial and technological shifts. See *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 222, 223 (1957) (noting "clearly discernible" trend "toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents" due in part to "th[e] increasing nationalization of commerce"); see also *Kulko* v. *Superior Court*, 436 U.S. 84, 101 (1978) (noting "the extension of *in personam* jurisdiction under evolving standards of due process").

Since the "canonical" decision in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), see *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977), whether a State may exercise personal jurisdiction over an out-of-state corporation has turned on whether the corporation established "minimum contacts with the State

such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Goodyear*, 564 U.S. at 923 (quoting *International Shoe*, 326 U.S. at 316) (brackets and internal quotation marks omitted). In determining whether a defendant has established minimum contacts to permit litigation in a particular forum, this Court has distinguished between two types of jurisdiction—"general or all-purpose jurisdiction," and "specific or case-linked jurisdiction." *Id.* at 919 (citing *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 nn.8-9 (1984)). General jurisdiction, which permits a forum to adjudicate matters "arising from dealings entirely distinct from" the defendant's contacts with the forum, exists when a company's contacts with a forum State "are so continuous and systematic as to render [it] essentially at home in the forum state." *Id.* at 919, 924 (citation omitted). Paradigmatic forums of general jurisdiction over a company are its place of incorporation or principal place of business. *Id.* at 919.

Alternatively, when a defendant is not at home in a State, courts in that forum may nevertheless hear some claims through the exercise of specific jurisdiction. Under that head of personal jurisdiction, when a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958), the defendant has sufficient contacts with the forum to support jurisdiction over "a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros*, 466 U.S. at 414 n.8; see *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472-473 (1985).

Where such minimum contacts exist, specific jurisdiction still may not comport with the Fourteenth Amendment if the defendant can present a "compelling case" that jurisdiction would not "comport with 'fair play and substantial justice,'" in light of considerations such as "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'" *Burger King*, 471 U.S. at 476, 477 (citations omitted).

2. a. Petitioner is a global biopharmaceutical company that is incorporated in Delaware and headquartered in New York. It employs about 6475 people in the New York/New Jersey metropolitan area, divided between its headquarters in New York and major research and development facilities in New Jersey. Petitioner maintains smaller operations in California, where it employs 250 sales representatives; runs supplemental research and development facilities; maintains a small government affairs office; and has a registered agent for service of process. Pet. App. 1a, 4a-5a.

Petitioner manufactures and sells Plavix, a prescription drug intended to treat cardiovascular problems by inhibiting blood clots. According to petitioner's declarations below, petitioner performed all of its work relating to development, manufacture, labeling, marketing, and regulatory approval of Plavix from its New York and New Jersey locations—not from its facilities in California. Petitioner did, however, sell

almost 187 million Plavix pills to distributors and wholesalers in California between 2006 and 2012, generating about $918 million in revenue. Pet. App. 2a, 5a.

b. In 2012, 678 plaintiffs filed suits in San Francisco Superior Court, raising Plavix-related claims against petitioner and McKesson Corporation, a pharmaceutical distributor headquartered in California. The plaintiffs came from 34 States. Texas had the largest number of plaintiffs, with 92 plaintiffs, followed by California, with 86 plaintiffs, and Ohio, with 71 plaintiffs. Pet. App. 1a, 2a-3a.

All plaintiffs—whose claims were divided among eight complaints—alleged the same 13 causes of action concerning negligent and wrongful "design, development, manufacture, testing, packaging, promoting, marketing, distribution, labeling, and/or sale of Plavix." Pet. App. 3a (citation omitted); see *id.* at 2a. The complaints alleged that the defendants had promoted Plavix to consumers and physicians by falsely representing the drug "as providing greater cardiovascular benefits, while being safer and easier on a person's stomach than aspirin," when, in fact, the defendants knew that Plavix actually posed a risk of heart attack and other injury that "far outweighs any potential benefit." *Id.* at 3a, 4a. They alleged that use of Plavix had caused injuries or, in the case of 18 of the individuals whose use of Plavix was at issue, caused death. *Id.* at 4a (citation omitted). The complaints did not allege that the out-of-state plaintiffs had been treated or injured in California. *Ibid.*

Petitioner moved to quash service of summons with respect to the 592 out-of-state plaintiffs, asserting lack of personal jurisdiction. Petitioner contended

that jurisdiction was improper under California Civil Procedure Code § 410.10 (West 2004), which authorizes "jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States," on the ground that the Due Process Clause of the Fourteenth Amendment barred California courts from exercising jurisdiction over the out-of-state plaintiffs' claims. Pet. App. 6a; see *id.* at 4a. Petitioner argued that it was not subject to general jurisdiction in California and that it was not subject to specific jurisdiction for the out-of-state plaintiffs' claims because the claims were not sufficiently linked to petitioner's conduct in California. *Id.* at 4a-5a.

c. The Superior Court denied petitioner's motion, concluding that petitioner's sales and activities in California were "sufficiently extensive to subject it to" general jurisdiction in California. Pet. App. 5a-6a. The California Court of Appeal then denied a petition for a writ of mandate on the same day that this Court issued its decision addressing general jurisdiction in *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014). Pet. App. 6a. The California Supreme Court vacated the denial of the writ of mandate and remanded to the Court of Appeal to reconsider the case in light of *Daimler*. *Ibid.*

d. On remand, the California Court of Appeal again denied a writ of mandate. The court agreed that in light of *Daimler*, petitioner's activities in California were insufficient to support general jurisdiction within the State. But it concluded that California courts had specific jurisdiction over petitioner concerning the nonresident plaintiffs' claims, given the nature of the claims and of petitioner's activities in California. Pet. App. 6a.

e. i. The California Supreme Court affirmed in a 4-3 decision. Pet. App. 1a-45a.

At the outset, the California Supreme Court concluded that petitioner's contacts with California "fall far short" of the level required to establish general jurisdiction within the State. Pet. App. 17a. Applying this Court's decisions in *Daimler* and other cases, the court observed that general jurisdiction extends only to forums as to which a defendant's conduct was "so substantial and of such a kind as to render [the defendant] at home there." *Id.* at 18a; see *id.* at 12a. Here, the court wrote, petitioner "may be regarded as being at home in Delaware, where it is incorporated, or perhaps New York and New Jersey, where it maintains its principal business centers." *Id.* at 16a. In contrast, the court concluded, petitioner was not at home in California, because "the company's total California operations are much less extensive than its activities elsewhere in the United States." *Id.* at 17a.

The California Supreme Court held, however, that California courts could exercise specific jurisdiction over petitioner with respect to the out-of-state plaintiffs' Plavix claims. Pet. App. 25a. The court first observed that there was "no question that [petitioner] has purposefully availed itself of the privilege of conducting activities in California" by marketing and advertising Plavix within the State, employing sales representatives there, maintaining research and development facilities within the State, and other conduct. *Id.* at 24a. Indeed, the court observed, petitioner "does not contend otherwise." *Ibid.*

The California Supreme Court next concluded that the out-of-state plaintiffs' claims were properly classified as "arising from or related to" petitioner's forum

contacts. Pet. App. 25a; see *id* at 25a-35a; see also *id.* at 21a n.2. The court rejected the argument that a defendant's forum contacts must be causally related to a plaintiff's injury or cause of action to satisfy this requirement. *Id.* at 22a, 30a. Instead, it reasoned, specific jurisdiction required only a "substantial nexus or connection between the defendant's forum activities and the plaintiff's claim." *Id.* at 21a (citation omitted). To determine whether the requisite nexus existed, the court employed a "sliding scale" of relatedness, *id.* at 32a, treating "the intensity of [the defendant's] forum contacts and the connection of the [plaintiffs'] claim to those contacts a[s] inversely related," *id.* at 25a (quoting *Vons Cos.* v. *Seabest Foods, Inc.*, 926 P.2d 1085, 1096 (Cal. 1996), cert. denied, 522 U.S. 808 (1997)).

Applying that approach, the California Supreme Court found that there was an adequate nexus between petitioner's forum contacts and the claims of the nonresident plaintiffs to support specific jurisdiction over the nonresident plaintiffs' claims. The court principally emphasized that petitioner was alleged to have engaged in "a single, coordinated, nationwide course of conduct"—the "nationwide marketing, promotion, and distribution of Plavix"—that gave rise to both in-state and out-of-state injuries. Pet. App. 28a-30a. "[C]onduct directed out of [petitioner's] New York headquarters and New Jersey operations center and implemented by distributors and salespersons across the country," the court wrote, had given rise to claims of injury in California and elsewhere. *Id.* at 30a. Given that "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product," the court con-

cluded, petitioner's "nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresident plaintiffs' claims" and the company's California contacts. *Id.* at 28a.

The California Supreme Court also found support for specific jurisdiction in petitioner's research and development activities in California, although there was no allegation that "Plavix itself was designed and developed in [petitioner's California] facilities." Pet. App. 29a. Since the nonresident plaintiffs had alleged negligent design and development of Plavix, and the California facilities engaged in research and development, the court reasoned that petitioner's "research and development activity in California provides an additional connection between the nonresident plaintiffs' claims and the company's activities in California." *Ibid.*

Finally, the California Supreme Court concluded that this is not a case in which, notwithstanding the requisite connection between the nonresident plaintiffs' claims and the defendant's forum contacts, it would be unreasonable for California courts to exercise jurisdiction in light of "traditional notions of fair play and substantial justice." Pet. App. 35a (citation omitted). The court emphasized that petitioner would be in California courts to defend the Plavix-related claims of the resident plaintiffs. While the court stated that "the fact that the nonresident plaintiffs greatly outnumber the California plaintiffs does give us some pause," *id.* at 39a, it concluded that California had an interest in providing a forum for the litigation, and that combining the resident and nonresident plaintiffs' claims in a single suit would promote "fair,

efficient, and speedy administration of justice," *id.* at 43.

ii. Three justices dissented. Pet. App. 46a-87a. The dissenting justices wrote that the claims of the nonresident plaintiffs "in no sense arise from [petitioner's] marketing and sales of Plavix in California, or from any of [petitioner's] other activities" in the State. *Id.* at 55a. Instead, the dissent stated, the out-of-state plaintiffs' "claims arise from activities *similar* to those [petitioner] conducted in California," because petitioner marketed and "sold the same allegedly defective product" in California and the nonresident plaintiffs' States. *Id.* at 48a-49a.

The dissent concluded that "mere similarity of claims is an insufficient basis for specific jurisdiction." Pet. App. 55a. It noted that each of the cases in which this Court had found specific jurisdiction following *International Shoe* had involved "a direct link between forum activities and the litigation"—not merely similarities between in-state and out-of-state conduct. *Id.* at 53a-54a. The dissent explained that when a defendant engaged in conduct *within* a State that gave rise to claims against it, "the forum state's interest in regulating conduct occurring within its borders is implicated." *Id.* at 57a. And when residents of a State sought redress for injuries, "each state has an interest in providing a judicial forum for its injured residents." *Ibid.* In contrast, the dissent reasoned, "California has no discernable sovereign interest in providing an Ohio or South Carolina resident a forum in which to seek redress for injuries in those states caused by conduct occurring outside California." *Id.* at 58a. In interpreting the doctrine of specific jurisdiction to allow California courts to adjudicate such

claims, the dissenters concluded, the court had "blur[red] the distinction between general and specific jurisdiction and impair[ed] the values of reciprocity, predictability, and interstate federalism served by due process limits on personal jurisdiction." *Id.* at 78a.

## SUMMARY OF ARGUMENT

The California Supreme Court erred in finding specific personal jurisdiction in California courts over the claims of out-of-state plaintiffs against an out-of-state defendant arising from out-of-state acts alleged to have caused out-of-state injuries. The court's broad approach to specific jurisdiction is at odds with this Court's decisions, and its holding is inconsistent with the principles of fair play and substantial justice that shape the Fourteenth Amendment's constraints.

A. This Court's decisions counsel against the California Supreme Court's approach to specific jurisdiction. Over the seven decades since this Court's seminal decision in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), this Court has never found that a state court could exercise specific personal jurisdiction over a defendant with respect to claims of nonresident plaintiffs that did not arise out of acts or injuries within the forum State.

The California Supreme Court's reasoning in extending specific jurisdiction to the circumstances of this case is also at odds with this Court's decisions. This Court has long treated general and specific jurisdiction as separate categories—with general jurisdiction grounded in the intensity of the defendant's connection to the forum and specific jurisdiction grounded in the relationship between the forum and the claims at issue. Treating intensity of forum contacts and relatedness as two factors to be balanced in

determining whether jurisdiction exists "elid[es] the essential difference between case-specific and all-purpose (general) jurisdiction," *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 927 (2011), and reduces the predictability of the jurisdictional analysis.

The California Supreme Court also departed from this Court's decisions in concluding that a state court may exercise specific jurisdiction over an out-of-state company with respect to its out-of-state acts because the company is engaged in a nationwide course of conduct that gives rise to claims both inside and outside the State. This Court has twice indicated that, to the contrary, specific jurisdiction does not exist when entirely out-of-forum events give rise to out-of-forum injuries. See *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 754 n.5 (2014); *Goodyear*, 564 U.S. at 920.

B. The California Supreme Court's expansive approach also is not consistent with the principles of "fair play and substantial justice," protected by the Fourteenth Amendment, *International Shoe*, 326 U.S. at 316 (citation omitted).

1. The Fourteenth Amendment ensures that individuals are subject only to legitimate adjudicatory authority, by "ensur[ing] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980). In the situations in which specific jurisdiction has been sustained by this Court, that jurisdiction enables a State to adjudicate claims arising from activity that occurs within its borders and is "therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919. But a State does

not ordinarily have a legitimate interest in exercising control over conduct of an out-of-state company *outside* the State's borders—merely because the company in question also engages in similar conduct within the forum State. Indeed, this Court has consistently rejected approaches that would enable States to routinely adjudicate claims regarding out-of-state companies' out-of-state conduct.

2. The Fourteenth Amendment also requires that defendants receive "fair warning that a particular activity may subject [them] to the jurisdiction of" forums in which they are not at home. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted; brackets in original). The California Supreme Court's approach fails to satisfy that requirement. By effectively replacing the bifurcated categories of specific and general jurisdiction with a "sliding scale," Pet. App. 32a, that court's approach would substantially reduce the ability of businesses to predict the jurisdictional consequences of their activities. And the court's conclusion that a company's out-of-state conduct can give rise to specific jurisdiction so long as it bears a "substantial nexus" to the company's in-state activities likewise does not give clear guidance to "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen*, 444 U.S. at 297.

3. The California Supreme Court's broad conception of jurisdiction may have repercussions for foreign relations and trade. The court's approach may be understood to expose foreign companies to suit in state courts for acts occurring outside of the United States, so long as the foreign acts are part of a course

of commercial conduct that also reached into the forum State. That understanding of adjudicatory authority could impair the United States' trade interests by creating disincentives to commercial activity on the part of foreign companies.

C. The California Supreme Court's expansive approach is not justified by other considerations. Interests of litigation efficiency do not justify an approach that could routinely expose companies to suit in all 50 States for claims arising anywhere in the country, based on nationwide courses of conduct. Existing jurisdictional principles—most notably rules of general jurisdiction—already enable plaintiffs from multiple States to bring claims against a U.S. company together in a single forum. And Congress can create additional mechanisms for combining claims and reducing duplicative proceedings, as it has done through measures such as the multidistrict litigation statute, 28 U.S.C. 1407.

These mechanisms are better suited to promoting efficiency than the California Supreme Court's approach. That approach would open companies to suit in myriad state courts for claims arising from their conduct nationwide. But it would not ensure that plaintiffs bring their claims in forums where they could be consolidated with existing lawsuits or in the forums where litigation would be most convenient and efficient.

## ARGUMENT

The California Supreme Court concluded that California courts may exercise specific personal jurisdiction to hear the claims of out-of-state plaintiffs against an out-of-state defendant arising from out-of-state acts alleged to have caused out-of-state injuries. This

Court's decisions have sustained state courts' exercises of specific jurisdiction over the claims of nonresident plaintiffs only when acts that gave rise to the plaintiffs' claims occurred in the State—when there is, in that sense, some causal connection between the defendant's activities in the forum State and the plaintiffs' claims. The California Supreme Court's far broader conception of specific jurisdiction is not consistent with those decisions, and it is inconsistent with the guiding principles of fair play and substantial justice that shape the Fourteenth Amendment's constraints.

### A. This Court's Decisions Do Not Support The California Supreme Court's Approach

This Court's decisions concerning personal jurisdiction do not support the California Supreme Court's conclusion that California courts have specific jurisdiction over claims by out-of-state plaintiffs that out-of-state acts caused them injury outside the State. None of the Court's decisions has found specific jurisdiction under similar circumstances. And this Court's precedents are at odds with both the California Supreme Court's sliding-scale framework and its conclusion that similar in-state conduct may support specific jurisdiction over nonresidents' out-of-state injuries from out-of-state conduct.

1. No decision of this Court supports personal jurisdiction within a state court over claims by out-of-state plaintiffs alleging out-of-state injuries from acts committed outside the forum State. In the more than 70 years since this Court's "pathmarking" decision in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), see *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919 (2011), the classes of cases in

which the Court has held that the Fourteenth Amendment permitted state courts to exercise jurisdiction over out-of-state defendants have fallen within two groups. First, under principles of "general jurisdiction," when a defendant has contacts with a forum state that are so continuous and systematic as to make the defendant essentially at home in the State, the forum State may adjudicate any and all claims against the defendant. *Goodyear*, 564 U.S. at 919.

Second, when a defendant is not at home in the State, this Court has recognized specific personal jurisdiction only in cases in which acts that gave rise to a plaintiff's claims occurred within the forum State. *International Shoe*, for instance, held that a state court could hear claims that a nonresident company had employed salesmen within the forum State but failed to make the unemployment-fund payments due as a result of those in-state activities. 326 U.S. at 321. *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957), upheld the exercise of personal jurisdiction in California over a California plaintiff's suit against an out-of-state insurer for benefits allegedly owed to a California beneficiary under a policy that was "delivered in California" to a resident of California who paid premiums from California. *Id.* at 223; see *id.* at 221-224. *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984), sustained personal jurisdiction to address libel allegedly committed (in part) by the out-of-state defendant's circulation of magazines within the forum State. *Id.* at 773-777. *Calder* v. *Jones*, 465 U.S. 783 (1984), similarly upheld a California court's exercise of jurisdiction in a libel case concerning an article "drawn from California sources" about "the California activities of a California resident" that had been circu-

lated in California and caused reputational harm in California. *Id.* at 788-789. And *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), sustained the exercise of personal jurisdiction under a Florida statute over a claim for breach of "a contract which had a substantial connection with that State," when the out-of-state defendant's "refusal to make the contractually required payments in" Florida and other alleged breaches "caused foreseeable injuries" to the plaintiff in Florida. *Id.* at 479, 480 (citation and emphasis omitted). Thus, as the dissent below noted, "[o]f the post-*International Shoe* decisions in which the high court actually found a factual basis for specific jurisdiction, each featured a direct link between forum activities and the litigation." Pet. App. 53a-54a.

2. This Court's decisions indicate that the California Supreme Court erred in extending specific jurisdiction well beyond those categories to reach claims of out-of-state plaintiffs for out-of-state injuries from acts occurring outside the forum State.

a. First, this Court's decisions are inconsistent with the "sliding scale" approach that the California Supreme Court utilized to find specific jurisdiction despite the absence of a link between petitioner's conduct in California and the out-of-state plaintiffs' claims. Pet. App. 32a; see *id.* at 25a (describing "the intensity of [the defendant's] forum contacts and the connection of the [plaintiffs'] claim to those contacts a[s] inversely related," so that "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim") (citation omitted).

This Court's decisions following *International Shoe* have treated specific and general jurisdiction as

distinct heads of jurisdictional authority, with distinct requirements. See, *e.g.*, *Goodyear*, 564 U.S. at 919 ("Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction"); see also *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 754 (2014). General jurisdiction looks to the intensity of a defendant's forum contacts. *Goodyear*, 564 U.S. at 919. If those contacts are systematic and continuous enough to make the defendant "essentially at home in the forum State," they support personal jurisdiction—without regard to the relationship between the plaintiff's claim and the forum. *Ibid.* In contrast, specific jurisdiction requires a particular connection between the plaintiff's claims and the defendant's forum-state activities—demanding that the claims be ones "arising out of or relating to" the defendant's forum contacts, see, *e.g.*, *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984). But "even a single act" by a defendant within the forum State can support specific jurisdiction, so long as the act is one that creates a "substantial" connection to the forum, rather than an attenuated one. *Burger King*, 471 U.S. at 475 n.18 (citation omitted). By merging intensity of contacts and relatedness of contacts onto a single spectrum, Pet. App. 24a-25a, the California Supreme Court's approach conflicts with this Court's decisions establishing specific and general jurisdiction as two separate categories. It thereby undermines the predictability that this Court's bifurcated approach affords.

The Court's decision in *Goodyear* makes plain that the considerations relevant to specific and general jurisdiction are not appropriately understood in this

manner as "inversely related" matters, Pet. App. 25a (citation omitted), to be balanced "on a case-by-case basis," *id.* at 35a, using a "sliding scale," *id.* at 32a. The appellate decision that this Court reviewed in *Goodyear* had found general jurisdiction over a manufacturer based on the "[f]low of [the] manufacturer's products into the forum"—a consideration usually reserved for the specific-jurisdiction context, where the court inquires whether a plaintiff's claims resulted from conduct by a defendant that amounted to the defendant purposefully availing itself of the forum State. 564 U.S. at 927; see *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 299 (1980). Rather than finding that the relatedness and intensity of the defendant's forum contacts were insufficient, when taken together, to support jurisdiction—as a sliding-scale approach would suggest—this Court faulted the lower court for "[c]onfusing or blending general and specific jurisdictional inquiries." *Goodyear*, 564 U.S. at 919. The Court explained that the decision below had "elided the essential difference" between specific and general jurisdiction by considering "an affiliation germane to specific jurisdiction" as bearing on general jurisdiction. *Id.* at 927 (emphasis omitted). The California Supreme Court committed a comparable error here: It concluded that the "intensity of [petitioner's] forum contacts" as a general matter authorized the court to find "minimum contacts based on a less direct connection between [petitioner's] forum activities and plaintiffs' claims than might otherwise be required." Pet. App. 25a, 32a (citation omitted).[1]

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[1] This Court's bifurcated approach makes sense, moreover, because specific and general jurisdiction under the Fourteenth Amendment rest on distinct rationales. General jurisdiction rests

b. This Court's decisions also indicate that, contrary to the approach of the California Supreme Court, specific jurisdiction ordinarily requires that some act giving rise to a nonresident plaintiff's claim or injuries have occurred within the forum State. This Court in *Helicopteros* reserved the questions "(1) whether the terms 'arising out of' and 'related to' describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists." 466 U.S. at 408 n.10. But the Court has since then twice indicated that—no matter how the "related to" category is construed—a State does not have specific jurisdiction over a nonresident defendant when entirely out-of-state events give rise to a nonresident plaintiff's claim for out-of-state injuries.

Thus, *Daimler* explained, as an "illustrat[ion of] the respective provinces of general and specific jurisdiction," that while "a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle" could bring suit in California based "on specific jurisdiction," if "a similar accident took place in

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on the principle that a State may exercise plenary adjudicatory authority over a defendant who is effectively a citizen of the State. See note 2, *infra*. By contrast, the core rationale for specific jurisdiction is that a defendant may reasonably expect to be sued within a State where it is not at home for harms tied to activities undertaken in that State. See pp. 21-23, *infra*. Because "[t]hese two bases are independent threshold tests, * * * a greater quantum of unrelated activity does not compensate for attenuated related contacts." Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 88.

Poland and injured Polish plaintiffs," the question of jurisdiction in California courts "would be one of general jurisdiction." 134 S. Ct. at 754 n.5. And *Goodyear* stated that "[b]ecause the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate" tort claims alleging that the tire had been defective. 564 U.S. at 919. Neither of those descriptions of specific jurisdiction is consistent with the California Supreme Court's approach, under which specific jurisdiction might well have existed over the nonresident plaintiffs' claims in *Daimler* and *Goodyear* if the corporate defendant had engaged in a similar course of conduct within the forum State.

### B. The California Supreme Court's Expansive Approach Is Inconsistent With The Principles Underlying Personal Jurisdiction

The California Supreme Court's expansive conception of specific jurisdiction is also not consonant with the principles of "fair play and substantial justice" that the Fourteenth Amendment's limitations on personal jurisdiction safeguard, *International Shoe*, 326 U.S. at 316 (citation omitted).

1. The limitations on personal jurisdiction imposed by the Fourteenth Amendment ensure that persons are subject only to legitimate exercises of state adjudicatory power. As this Court has put it, the Due Process Clause "ensures that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. Those jurisdictional "restriction[s] on state sovereign power" vindicate "the individual liberty

interest preserved by the Due Process Clause," *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982), by ensuring that a person is "deprived of life, liberty, or property only by the exercise of lawful power," *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 879 (2011) (plurality opinion).

The California Supreme Court's broad conception of specific jurisdiction would undercut that important function of the Due Process Clause. Limited to the contours within which the Court has sustained the exercise of specific jurisdiction, that adjudicatory authority serves significant sovereign interests. It enables state courts to adjudicate claims that arise from an "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 782 (1988) (*General Look*); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966)). As Professor Brilmayer has put it, "[a]djudication of a dispute is a means toward the legitimate end of regulating local conduct or prescribing its legal consequences." Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444, 1457 (1988) (*Related Contacts*); see *General Look* 739-740. In addition, when a State provides a forum to adjudicate claims by its own residents, it serves its "manifest interest" in providing state residents "with a convenient forum for redressing injuries" caused by "out-of-state actors." *Burger*

*King*, 471 U.S. at 473 (citation omitted); see *McGee*, 355 U.S. at 223.[2]

The California Supreme Court's reliance on a company's nationwide course of commercial activity as a ground to exercise adjudicatory authority over not simply in-state activities but also out-of-state conduct, in contrast, does not fit comfortably with "the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen*, 444 U.S. at 293. While an "activity or an occurrence that takes place *in* the forum State * * * is therefore subject to the State's regulation," *Goodyear*, 564 U.S. at 919 (emphasis added), a State has no comparable regulatory interest in exercising control over activities such as advertising and distribution of products in its sister States, see *World-Wide Volkswagen*, 444 U.S. at 293 (stating that "[t]he sovereignty of each State * * * implie[s] a limitation on the sovereignty of all its sister States" that is safeguarded by the Fourteenth Amendment); see also *Nicastro*, 564 U.S. at 884 (plurality opinion) (stating that in "the federal balance * * * each State has a sovereignty that is not subject to unlawful intrusion by other States").

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[2] Principles of general jurisdiction are based on distinct sovereign interests. They reflect the understanding that a defendant may have ties with a forum State that are so pervasive as to make it reasonable for the sovereign to exercise adjudicatory supervision over all of the entity's activities. See, *e.g.*, *Nicastro*, 564 U.S. at 880 (plurality opinion) ("Citizenship or domicile—or, by analogy, incorporation or principal place of business for corporations— * * * indicates general submission to a State's powers."); *Helicopteros*, 466 U.S. at 414 & n.9. General jurisdiction also ensures that plaintiffs have "recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Daimler*, 134 S. Ct. at 760.

Indeed, this Court has consistently rejected approaches that would enable States to routinely adjudicate claims regarding out-of-state companies' out-of-state conduct, finding such approaches inconsistent with the "territorial limitations on the power of the respective States" that the Fourteenth Amendment safeguards, *World-Wide Volkswagen*, 444 U.S. at 294 (citation omitted); see *International Shoe*, 326 U.S. at 317 (explaining that the reasonableness of a State's exercise of jurisdiction must be assessed "in the context of our federal system of government"). *Goodyear*, for instance, held that due process principles did not support the "sprawling view of general jurisdiction urged by respondents," emphasizing that under the respondents' view, "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed." 564 U.S. at 929. And *Daimler* similarly rejected the argument that California could exercise jurisdiction over a company based on its subsidiary's substantial commercial activities within the State, reasoning that if that "exorbitant" and "unacceptably grasping" view were accepted, "the same global reach would presumably be available in every other State in which [the subsidiary's] sales are sizable." 134 S. Ct. at 761. The same analysis holds here. If a company's "nationwide course of conduct," Pet. App. 30a, enabled every State to exercise jurisdiction over all claims tied to that course of conduct, every State would be able to exercise adjudicatory authority over a huge spectrum of economic activity occurring outside its own borders.[3]

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[3] It is hardly unusual for businesses to engage in "nationwide course[s] of conduct" regarding the advertising, manufacturing, or

2. The requirements of due process under the Fourteenth Amendment also demand that individuals and businesses receive "fair warning that a particular activity may subject [them] to the jurisdiction of" a forum in which they are not at home. *Burger King*, 471 U.S. at 472 (citation omitted; brackets in original); see *World-Wide Volkswagen*, 444 U.S. at 297 (requiring jurisdictional rules to afford "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit"); cf. *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) (explaining that "[s]imple jurisdictional rules * * * promote greater predictability").

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sale of products, Pet. App. 30a. Not only can nationwide approaches produce economic efficiencies, cf. *World-Wide Volkswagen*, 444 U.S. at 293 (noting "increasing nationalization of commerce") (citation omitted), but federal regulatory requirements can constrain companies' ability to adopt manufacturing or advertising approaches that differ substantially from State to State. Manufacturing and marketing of prescription drugs like Plavix, for instance, are strictly regulated by the Food and Drug Administration (FDA). See 21 C.F.R. Pt. 211 (regulation of drug manufacturing); 21 C.F.R. 202.1 (specifying material that must be included in advertisements); 21 C.F.R. 314.81(b)(3)(i) (requiring advertisers to submit promotional materials concerning prescription drugs for FDA review). Other types of consumer products, from cars, see, 49 C.F.R. Pt. 571 (regulations of the National Highway Traffic Safety Administration), to cribs, see 16 C.F.R. 1219.2 (regulations of the Consumer Product Safety Commission), to bicycle helmets, see 16 C.F.R. Pt. 1203, also must conform to nationwide federal requirements. Cf. *Goodyear*, 564 U.S. at 922 n.2 (noting federal efforts to encourage compliance with particular manufacturing and marking requirements even with respect to goods that were not "destined for sale in the United States").

The California Supreme Court's approach fails to satisfy that requirement. By replacing the bifurcated categories of specific and general jurisdiction with an approach that balances "the intensity of [the defendant's] forum contacts and the connection of the [plaintiffs'] claims," Pet. App. 25a (citation omitted), "on a case-by-case basis," *id.* at 35a, using a "sliding scale," *id.* at 32a, the court would substantially reduce businesses' ability to predict the extent to which activities within a forum State will subject them to the jurisdiction of that State's courts. And the court's suggestion that courts will often have specific jurisdiction over claims concerning out-of-state activities that bear a "substantial connection," *id.* at 27a, or "substantial nexus," *id.* at 33a, to the defendant's forum activities would introduce still further unpredictability, by making jurisdiction turn on an "amorphous concept of relatedness" of uncertain scope. *General Look* 738; see *ibid.* ("Practically any contact might appear to be related to a cause of action and thus support specific jurisdiction"); see also *Related Contacts* 1460. Because the court's approach does not "allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen*, 444 U.S. at 297, it "offend[s] traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316 (citation and internal quotation marks omitted).

3. Finally, the California Supreme Court's approach could have implications for the United States' international relations and trade interests. See *Daimler*, 134 S. Ct. at 763 (concluding that the Ninth Circuit's "expansive view of general jurisdiction" was

disfavored in part because of "the risks to international comity," because "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals" in that case); see also *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 115 (1987).

In particular, the California Supreme Court's interpretation of the "arising out of or related to" requirement for specific jurisdiction would be especially problematic if it were applied to expose foreign corporations to suit in California state court for conduct outside the United States' borders—simply because the company in question was engaged in a multijurisdictional course of conduct that gave rise to at least some claims of injury within that forum State. That understanding of adjudicatory authority could exceed what some other nations would regard as reasonable. For example, as this Court has noted, in the European Union, corporations may be subject to suit at their place of incorporation or headquarters. See *Daimler*, 134 S. Ct. at 763. And European Union rules also recognize "the occurrence of events in the forum," such as "the place of the commission of the tortious act or the effect of injury in a tort case," as supporting specific or "special" jurisdiction, because those locations "offer a litigation-convenient forum and because the state may have a regulatory interest in asserting its authority." Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. Rev. 591, 608, 609 (2012); see Parliament and Council Regulation 1215/2012, Arts. 4(1), 63(1), 2012 O.J. (L 351), 1, 7, 18 (EU)). But those rules do not provide for adjudicatory jurisdiction over nonresidents' claims arising from

out-of-forum conduct based on the defendant's similar commercial conduct within the forum State.

Broad assertions of adjudicatory authority can have repercussions for trade and international relations. Here, California's assertion of jurisdiction to hear claims against an out-of-state company arising from out-of-state conduct may create undesirable uncertainty for foreign enterprises considering the ramifications of commercial activities in the United States. It could therefore impair American trade and investment interests by chilling economic activity by foreign companies.

### C. Efficiency Considerations Do Not Justify The California Supreme Court's Approach

The California Supreme Court's broad assertion of adjudicatory authority is not justified by considerations of litigation efficiency. This Court has adjusted personal jurisdiction rules over time to accommodate changes in commerce and technology, see, *e.g.*, *McGee*, 355 U.S. at 222-223, and considerations of efficiency and convenience, see *Burger King*, 471 U.S. at 477. In particular, the determination of whether jurisdiction over a class of claims comports with "fair play and substantial justice," *International Shoe*, 326 U.S. at 320, properly takes into account "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," *Burger King*, 471 U.S. at 477 (citation omitted). Such interests may "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Ibid.*; see *Asahi*, 480 U.S. at 115 (noting that the Court had "admonished courts to take into consideration the interests of the 'several States,' in addition to the forum State, in the

efficient judicial resolution of the dispute and the advancement of substantive policies").

Considerations of litigation efficiency, however, do not justify an approach to specific jurisdiction that would routinely open companies to suit in the courts of all 50 States for claims arising anywhere in the country, based on the companies' nationwide course of commercial conduct. Traditional jurisdictional doctrines already ensure that litigants pursuing similar claims against a U.S. company may bring their claims together in a single court. Under principles of general jurisdiction, such plaintiffs may bring claims against a domestic corporation in a State where the business is at home, such as its State of incorporation or headquarters. Indeed, providing "at least one clear and certain forum in which a corporate defendant may be sued on any and all claims" is a central objective of general jurisdiction. *Daimler*, 134 S. Ct. at 760. Numerous plaintiffs have availed themselves of that basis for jurisdiction in litigation concerning Plavix by filing suits in New York, where petitioner is headquartered. See Pet. Br. 50 (citing 2012 coordination order pertaining to more than 40 Plavix lawsuits filed in New York state courts in the prior year).

Plaintiffs from multiple States who assert injuries from a "single, coordinated, nationwide course of conduct," Pet. App. 29a-30a, will also often be able to invoke specific jurisdiction to bring their claims together in a single forum, by filing complaints in the forum where the company's nationwide approach was developed or directed. Here, for instance, because petitioner directed the development, distribution, and marketing of Plavix from New York and New Jersey, *ibid.*; see Pet. Br. 50, California and non-California

plaintiffs could have filed complaints together in those forums based on principles of specific jurisdiction.

Moreover, Congress can provide additional mechanisms for consolidating related claims—as it has done through legislation such as the multidistrict litigation (MDL) statute, 28 U.S.C. 1407. Under the MDL statute, when claims that were brought in (or removed to) federal court involve "one or more common questions of fact," a judicial panel may transfer the cases to a single district court for pretrial proceedings, if doing so will serve "the convenience of parties and witnesses" and "promote the just and efficient conduct" of the actions to be consolidated. 28 U.S.C. 1407(a). Those procedures are commonly used to consolidate "toxic tort, mass disaster, and product defect" lawsuits, including cases involving "allegedly defective pharmaceutical products." 3 Michael Dore, *Law of Toxic Torts* § 21.2 (2016). Indeed, as petitioner observes, MDL procedures have been used to consolidate cases regarding Plavix itself, in proceedings that have been ongoing in the District of New Jersey since 2013. Pet. Br. 51 (citing *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.*, 923 F. Supp. 2d 1376 (J.P.M.L. 2013)).

Congress has taken further steps to provide a single, efficient federal forum for particular classes of claims. For instance, the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, authorizes removal to federal court of some "mass action[s]" involving 100 or more plaintiffs, even if there exists only minimal diversity of citizenship between the parties, 28 U.S.C. 1332(d). Once such cases are brought into federal court, MDL procedures can be used to consolidate the cases with related federal suits. Similarly,

when money or property is claimed by two or more adverse claimants of diverse citizenship, the federal interpleader statute provides a single federal forum to adjudicate their claims, 28 U.S.C. 1335, utilizing a nationwide service of process provision to enable the court to reach parties that reside in multiple jurisdictions, see 28 U.S.C. 2361.[4] And the Multiparty, Multiforum Trial Jurisdiction Act of 2002, 28 U.S.C. 1369, creates jurisdiction in federal district courts for "civil

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[4] Congress has generally directed that federal district courts "follow state law in determining the bounds of their jurisdiction over persons," *Daimler*, 134 S. Ct. at 753, by linking their jurisdiction to service of process on a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located," Fed. R. Civ. P. 4(k)(1)(A). However, Congress has in some circumstances authorized federal courts to exercise broader personal jurisdiction, including through provisions that authorize nationwide service of process with respect to specified claims. See, *e.g.*, 28 U.S.C. 1697, 2361; see also *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 163 (2d Cir. 1987) (describing MDL provisions as legislation that "authorize[s] the federal courts to exercise nationwide personal jurisdiction" in MDL cases), cert. denied, 484 U.S. 1004 (1988); cf. *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (per curiam) (concluding that because MDL transfers are "in essence, a change of venue for pretrial purposes," they "are simply not encumbered by considerations of in personam jurisdiction").

This Court has reserved the question, relevant to such provisions, of whether "a federal court could exercise personal jurisdiction, consistent with the Due Process Clause of the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits." *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987); see *Asahi*, 480 U.S. at 113 n.* (opinion of O'Connor, J.). Because that question is not presented in this case, there is no occasion for the Court to address it here.

action[s] involving minimal diversity * * * that arise[] from a single accident, where at least 75 natural persons have died," 28 U.S.C. 1369(a), utilizing procedures that allow nationwide service of process, 28 U.S.C. 1697.

In other circumstances, when courts cannot formally consolidate related cases, "[f]ederal and state judges frequently cooperate informally and effectively to coordinate discovery and pretrial proceedings in mass tort cases." *Manual for Complex Litigation* (Fourth) § 22.4 (2004). Mechanisms that courts have employed "to reduce costs, delays, and inefficiencies" in parallel proceedings include joint discovery programs, joint settlement sessions, coordinated pretrial proceedings, and the use of "test cases," in which litigants "agree[] to be bound by the results" of trials on representative claims. William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689, 1699, 1700 (1992); see *id.* at 1700-1707.[5]

The California Supreme Court's expansive approach to specific jurisdiction is less suited than mechanisms like these to avoiding duplication of re-

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[5] This case does not present any question concerning whether a state court may entertain class actions, under established rules, to resolve claims arising from conduct in multiple jurisdictions. In particular, it does not present the question whether it is sufficient that the claims of named plaintiffs arise from conduct occurring within the forum State, or whether the Fourteenth Amendment also requires that claims of nonnamed plaintiffs arise from conduct occurring within the State. See *Devlin* v. *Scardelletti*, 536 U.S. 1, 9-10 (2002) (stating that "[n]onnamed class members * * * may be parties for some purposes but not for other[]" purposes); see also *id.* at 10 (noting that nonnamed class members are "not parties" with respect to determining diversity for purposes of jurisdiction).

sources from litigation across multiple forums. While California's approach would open companies to suit in myriad state courts for claims arising from events nationwide, it would not require all plaintiffs to file their suits in any particular State. As a result, there could be no guarantee that plaintiffs would choose to bring their claims in forums where they could be consolidated with existing suits by other plaintiffs. See Pet. Br. 50-51 (noting the plaintiffs chose not to bring suit in New York, where petitioner is subject to general jurisdiction and other claims are pending, or in federal court, where the plaintiffs' claims could have been consolidated through MDL procedures). Nor is there any guarantee that plaintiffs who have their choice of jurisdictions would seek out forums where litigation is most convenient for the parties and witnesses—rather than joining claims with those of resident plaintiffs in forums with the procedural rules or jury pools that the plaintiffs consider most favorable. And if nonresident plaintiffs' claims were joined with those of some resident plaintiffs, a court might be reluctant to decline jurisdiction. Cf. Pet. App. 38a-39a (finding specific jurisdiction reasonable even though nonresident plaintiffs outnumbered resident plaintiffs, because petitioner already faced the burden of defending against resident plaintiffs' claims in California, and the residents' claims meant that California "ha[d] a clear interest in providing a forum" for the litigation). Particularly in view of the alternative mechanisms for promoting efficient adjudication, no interest in efficiency justifies the California Supreme Court's expansive approach to personal jurisdiction.[6]

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[6] This case presents no occasion to consider whether a legislature could, consistent with due process principles, craft a well-

## CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted.

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MARCH 2017

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defined rule for specific jurisdiction that reaches beyond the circumstances in which the exercise of specific jurisdiction has been sustained by this Court. Cf. *Hanson*, 357 U.S. at 252 (explaining the recognition of specific jurisdiction in *McGee*, *supra*, as resting in part on the State's having "enacted special legislation" evidencing its interest in providing a forum for the type of claim at issue); *Hanson*, 357 U.S. at 252-254 (relying in part on the absence of a statute concretely defining a governmental interest in rejecting specific jurisdiction), see *Shaffer* v. *Heitner*, 433 U.S. 186, 214-215 (1977) (finding that specific jurisdiction did not comport with due process principles in part because of "the failure of the Delaware Legislature to assert" the interest in jurisdiction over corporate fiduciaries that was claimed by the plaintiffs).

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APR - 7 2017
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No. 16-466

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner*,

*v.*

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
*Respondents*.

**On Writ Of Certiorari to the California Supreme Court**

## AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, respectfully submits this brief as *amicus curiae* in support of Respondents.

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits and personal injury actions. Throughout its history, AAJ has served as a leading advocate of the right to trial by jury, as well as for access to the courts and for the preservation of protections enjoyed by ordinary citizens that is afforded by the common law and state tort law.

In serving that purpose, AAJ represents its members and their clients in matters before the courts, Congress, and the Executive Branch. To that end, AAJ regularly files *amicus* briefs in cases that raise issues of vital concern to its members and their clients, including cases involving personal jurisdiction. *See, e.g., Daimler AG v. Bauman,* 134 S. Ct. 746 (2014); *J. McIntyre Mach., Ltd. v. Nicastro,* 564 U.S. 873 (2011).

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[1] This brief is filed pursuant to the blanket consent filed by all parties. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

To force needlessly duplicative trials in venues outside of California, Bristol-Myers Squibb [hereinafter, "Bristol-Myers"] asks this Court to apply an atomistic view of personal jurisdiction divorced from the standards normally applied to due process and from this Court's relevant jurisprudence and unconnected to modern economic realities. In addition, the jurisdictional rubric proposed by Bristol-Myers would throw doubt, for the first time, on the constitutionality of numerous federal statutes that seek to adjudicate a wide range of matters efficiently and effectively, to all parties' benefit, by permitting courts to gather far-flung parties into a single venue to dispose common issues. The broad undesirable effect of the wooden approach being proposed underscores the extreme nature of the enterprise that Bristol-Myers urges upon this Court and would mark the unwelcome beginning of a return to the formalistic, purely mechanical geography-based jurisdictional formulation that was the hallmark of the long-interred *Pennoyer v. Neff*, 95 U.S. 714 (1877).

To the contrary, modern jurisprudence recognizes the far greater likelihood that defective products can injure significant numbers of people without much that distinguishes one claim from another, that the far more mobile nature of modern society must be recognized, and that revolutionary advances in modern communications technology changes the nature of the due-process inquiry at the heart of personal-jurisdiction jurisprudence. These factors, the implications the advocated approach would have for federal statutes aggregating claims to promote efficiency and avoid inconsistent results, and

the very idea that some plaintiffs would have to sue one defendant in California and another elsewhere in separate trials in this very case warrants affirmance of the decision below.

## ARGUMENT

Today, as the "canonical opinion"[2] holds, due process, as applied to the exercise of specific personal jurisdiction, establishes a flexible, circumstance-driven standard: accordance with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Even when that standard was first articulated, a concurring member of this Court explained that the fair-play canon allows a "State to act if upon an estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business, we conclude it is reasonable to subject it to suit in a State where it is doing business." *Id.* at 324 (Black, J., concurring) (internal quotations omitted).

Justice Black's explanation fully fits the due-process requirements subsequently adopted by this Court. Inconvenience to both the plaintiff and the defendant remains a primary consideration, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980)), as are the "interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental

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[2] *Daimler,* 134 S. Ct. at 754 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 923 (2011)).

substantive social policies." *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

Reasonableness is thus the touchstone of the inquiry, and longstanding federal statutory law demonstrates the reasonableness of permitting the claims at issue here to be aggregated.

## I. A NUMBER OF FEDERAL STATUTES PERMIT JURISDICTION ON SIMILAR OR LESSER CONTACTS.

The exercise of personal jurisdiction, whether as a matter of federal or state law, must satisfy due process. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). The jurisdictional limitations imposed by the Fifth Amendment's guarantee of due process, U.S. Const. amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law") for federal statutory purposes and the limitations of the Fourteenth Amendment's guarantee, U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"), do not differ. Both incorporate *International Shoe's* "traditional notions of fair play and substantial justice" standard. 326 U.S. at 316. Due process requires a defendant be given adequate notice of the suit, *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-14 (1950), and that the exercise of jurisdiction not be so inconvenient to the parties so as to be unfair or unreasonable. *World-Wide Volkswagen Corp.*, 444 U.S. at 291-92.

The protections afforded by due process, at least for purposes of personal jurisdiction, do not differ on the basis of which constitutional amendment

applies. *Bauxites* clarified that due process's "personal jurisdiction requirement recognizes and protects an individual liberty interest." 456 U.S. at 702. Personal Jurisdiction is not a function of sovereignty or the scope of a sovereign's power. *Id.*; *see also Pardazi v. Cullman Medical Center*, 896 F.2d 1313, 1317 (11th Cir.1990) ("Unlike the rules of subject matter jurisdiction, the rules of personal jurisdiction protect an individual's rights, not a sovereign's rights.") (citing *Bauxites*, 456 U.S. at 702-03). For that reason, the personal-jurisdiction protections afforded by the Fifth and Fourteenth Amendments cannot differ.

Thus, personal jurisdiction under federal statutes should be subject to the same due-process considerations and limitations as state causes of action. Critically, it is important to remember that the "Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Weighing these frequently opposing values requires a court to undertake a complex evaluation for the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (citations omitted). Unlike some legal principles, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* (citations omitted). Instead, the due-process guarantees "express[] the requirement of 'fundamental fairness,'" which mandates a court "first consider[] any relevant precedents and then . . . assess[] the several interests that are at stake." *Lassiter v. Dep't of Soc. Servs. of*

*Durham Cnty.*, 452 U.S. 18, 24-25 (1981). Doing so in the instant matter decisively favors affirmance.

Bristol-Myers has proposed an analysis that contrasts with this Court's expressed understandings of due process and would suggest that a number of federal statutes whose personal jurisdictional reach has not been subject to serious question would actually violate due process. Because the limitations Bristol-Myers would have this Court impose would so cripple the efficacy of important federal laws and the ability of courts to resolve important matters, this Court should not adopt Petitioner's suggested program.

### A. The Federal Interpleader Act Permits Far-Flung Claimants to Be Aggregated in a Single Jurisdiction to Resolve all Claims.

One of the federal statutes that permit claims to be heard in court on a basis that the test offered by Bristol-Myers would not permit is the Federal Interpleader Act, 28 U.S.C. § 1335. Congress enacted the current interpleader law in 1936, specifically to address the lack of personal jurisdiction in a single state court[3] over all the claimants at a time when personal jurisdiction was governed by the *Pennoyer*

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[3] Interpleader actions under the statute nearly always involve state law-based claims. *See, e.g., Great Falls Transfer & Storage Co. v. Pan Am. Petroleum Corp.*, 353 F.2d 348, 350 (10th Cir. 1965) ("In determining those rights the federal court is, of course, bound by state law."); *Kerrigan's Estate v. Joseph E. Seagram & Sons, Inc.*, 199 F.2d 694, 697 (3d Cir. 1952) ("federal court applies state law").

standard. *See* Zechariah Chafee, Jr.,[4] *Interpleader in the United States Courts,* 41 Yale L.J. 1134, 1136 (1932); 7 Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 1701 (3d ed.). It has a low jurisdictional threshold of $500, 28 U.S.C. § 1335, requires only "minimal diversity," and broadly remedies the "problems posed by multiple claimants to a single fund." *State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523, 530 (1967). It further provides that an interpleader action "may be brought in the judicial district in which one or more of the claimants reside," 28 U.S.C. § 1397, thereby anticipating the exercise of personal jurisdiction over non-resident claimants.

To actualize that broad authorization of venue, the Act provides for nationwide service of process,[5] 28 U.S.C. § 2361, and establishes personal jurisdiction over a defendant *"even if she lacks minimum contacts"* with the forum state. *Mudd v. Yarbrough,* 786 F. Supp. 2d 1236, 1242-43 (E.D. Ky. 2011) (emphasis added). *See also Great Lakes Auto Ins. Grp. v. Shepherd,* 95 F. Supp. 1, 5 (W.D. Ark. 1951) ("court acquired jurisdiction of the defendants ... by virtue of the service on them in Illinois, at least for purposes of adjudicating their claim, if any, to the fund deposited

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[4] Professor Chafee was primarily responsible for the efforts that led to adoption of the current federal interpleader statute. 7 Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 1701 n.1 (3d ed.).

[5] When a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction. *See, e.g., Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,* 119 F.3d 935, 942 (11th Cir. 1997); *Lisak v. Mercantile Bancorp, Inc.,* 834 F.2d 668, 671 (7th Cir. 1987), *cert. denied,* 485 U.S. 1007 (1988).

in the court"); *Stitzel–Weller Distillery, Inc. v. Norman*, 39 F. Supp. 182, 188 (W.D. Ky. 1941) ("statute confers jurisdiction over all the defendants served, even those residing in Ohio and Florida").

The Federal Interpleader Act allows adjudication of disputes where claimants hail from multiple jurisdictions, none of which would meet the standard for personal jurisdiction for all claimants. To say that due process requires multiple trials in different jurisdictions to determine the various conflicting claims in the exercise of personal jurisdiction, as Bristol-Myers would have this Court do, would rob this 80-year-old statute of all utility, create a race to the courthouse by claimants attempting to establish their claim without the presentation of countervailing claims by others, and leave the acknowledged debtor in danger of having to pay multiple judgments in excess of the total debt as in *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916). In Dunlevy, this Court held that two different judgments, one obtained in Pennsylvania and one in California were both valid, forcing the insurer to pay twice. According to Federal Practice and Procedure, Congress passed the first federal interpleader statute, which only governed claims against insurance policies, *see* Federal Interpleader Act of 1917, 39 Stat. 929, to remedy the disagreeable result in *Dunlevy*, 7 Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 1701 (3d ed.).

The Act and its purpose have particular salience for the issue before this Court. The non-California plaintiffs unquestionably have claims against McKesson Corporation, a California-based national distributor of Plavix for Bristol-Myers. Their claims will be able to proceed efficiently in California,

along with the other cases filed there without difficulty. Bristol-Myers, subject to trial over the same claims and same evidence in California, seeks separate trials in other jurisdictions for the non-California residents, raising the specter that McKesson might be held liable by one jury while a second may not find Bristol-Myers liable, even though, by any measure, it is the more culpable of the two.

Trying the two separately in different jurisdictions raises serious due-process issues for a plaintiff by virtue of the door it opens to the "empty-chair" defense. The defense is often invoked in multiple defendant personal injury cases to blame absent defendants for all or most of the liability. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 217 (1994). The absent defendants, who will have the best information about either their lack of liability or the minuteness of their responsibility, are not bound by any apportionment made in a case in which they are not a party, much like the result in *Dunlevy*. The result of the two trials could well be that juries in both jurisdictions find each defendant liable but apportion most of the fault to the absent defendant. Thus, a successful plaintiff may end up collecting meager compensation due to malapportioned liability.

On the other hand, highly favorable decisions could be rendered in both separate trials, resulting in a windfall to the plaintiff, permitting the collection of more than 100 percent of the damages. Thus, separating out the trials can engender perverse results from the perspective of either party.

In the end, however, the empty-chair defense, which Bristol-Myers's approach would authorize,

"arbitrarily prejudices plaintiffs by requiring them to exonerate [or minimize the liability of] nonparties," in order to obtain a remedy for the defendants' misconduct. *Newville v. State, Dep't of Family Servs.*, 883 P.2d 793, 802 (Mont. 1994) (analyzing due process implications of the empty-chair defense). Instead, the California Supreme Court logically and properly asserted jurisdiction over all appropriate claims, much as the interpleader statute authorizes, and should be affirmed.

### B. The Hatch-Waxman Act, Utilized by Companies like Bristol-Myers, Would Also Run Afoul of Its Proposed Personal Jurisdiction Rule.

Another federal statute with an expansive approach to personal jurisdiction that Bristol-Myers would treat as violative of due process is the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98–417, 98 Stat. 1585, as amended, commonly known as the Hatch–Waxman Act. It created a regulatory framework for the development and timely approval of generic drugs. At the same time, it granted the patent owner for the name-brand drug the right to exclude others from making or selling its drugs during the life of the patent. 35 U.S.C. § 154(a)(1).

Even so, after a name-brand drug receives approval from the Food and Drug Administration (FDA), "another company may seek permission to market a generic version" by filing "an abbreviated new drug application (ANDA)," showing "the generic drug has the same active ingredients as, and is biologically equivalent to, the brand-name drug." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566

U.S. 399, 404-05 (2012). The FDA, lacking expertise and authority to review patent claims, defers to the courts to determine any patent disputes between the name-brand and generic manufacturers. *Id.* at 406-07 (citing 68 Fed. Reg. 36683 (2003)).

To enable the resolution of patent disputes between the two manufacturers, Hatch-Waxman made the act of filing an ANDA by a generic-drug manufacturer a technical act of patent infringement, 35 U.S.C. § 271(e)(2), so that any dispute between the name-brand and generic manufacturer would be resolved before the generic drug actually reached the market. Ellen J. Flannery & Peter Barton Hutt, *Balancing Competition and Patent Protection in the Drug Industry: The Drug Price Competition and Patent Term Restoration Act of 1984*, 40 Food Drug Cosm. L.J. 269, 285 (1985).

The personal-jurisdiction question arises because the ANDA establishes an *intention* to manufacture a biochemical equivalent of a patent owner's drug without taking steps to market it. Because an intent to infringe comprises the gist of the action, no jurisdiction stands as the logical venue to bring an action. Moreover, the Federal Circuit has held that Maryland, where the FDA is located, is not a proper jurisdiction for such a lawsuit even though patent infringement of filing constitutes a tort that apparently takes place there. *Zeneca Ltd. v. Mylan Pharms., Inc.*, 173 F.3d 829, 832, 836 (Fed. Cir. 1999).

Facing the issue recently, the Federal Circuit held that Mylan Pharmaceuticals, an ANDA applicant incorporated in and with a principal place of business in West Virginia, could be sued by patent owners in the U.S. District Court of Delaware. *Acorda*

*Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 625 (2017). Mylan resisted personal jurisdiction in Delaware because its only contacts were that it had registered to do business, appointed an agent to accept service, and eventually intended to sell its drugs directly in the state. *Id.* at 758. Nonetheless, the Circuit reasoned that "Mylan has taken the costly, significant step of applying to the FDA for approval to engage in future activities—including the marketing of its generic drugs—that will be purposefully directed at Delaware (and, it is undisputed, elsewhere)." *Id.* at 759. It concluded that "the minimum-contacts standard is satisfied by the particular actions Mylan has already taken—its ANDA filings—for the purpose of engaging in that injury-causing and allegedly wrongful marketing conduct in Delaware," *id.*, even though sales of the infringing drugs had not, and may never, take place. The Federal Circuit, then, held that the infringement action could be brought in any federal district court throughout the country because "Mylan seeks approval to sell its generic drugs throughout the United States." *Id.* at 763.

By comparison, Mylan's connections to Delaware are far more tenuous than the Bristol-Myers connections to California. Bristol-Myers maintains four drug research facilities and employs 414 employees in the state, including 250 sales representatives. Pet. App. 5a, 29a; J.A. 82. It operates a total of five offices, including a government affairs office in the state. J.A. 82. It has marketed and advertised Plavix throughout the state. Pet. App. 24a.

Moreover, regardless of the outcome of this case, Bristol-Myers will defend identical actions by users of its drug in California, relying heavily on

identical evidence to defend materially identical allegations.[6] If a Hatch-Waxman ANDA infringement action comports with due process when brought anywhere in the United States, then the maintenance of this action in California easily passes constitutional muster.

### C. Personal Jurisdiction under the RICO Statute Would Be Adversely Affected by Bristol-Myers Proposed Limits.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 to 1968, creates a private right of action with nationwide service[7] for damages against violators who engage in

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[6] Amicus Curiae GlaxoSmithKline LLC (GSK) argues that permitting California to maintain jurisdiction over this matter creates practical difficulties in deposing and putting a plaintiff's personal physician on the stand to determine if better warnings would have caused the doctor to prescribe a different medication. *See* GSK Am. Br. 15-17. The argument should have no effect on the outcome of this case. No one doubts that plaintiffs from any state could have brought their actions, without raising any possible personal jurisdiction objection in Delaware, where Bristol-Myers is incorporated, or in New York, where it is headquartered. Both venues would have created the same difficulties GSK cites to deposing or calling as a witness the plaintiffs' treating physicians. Because those considerations do not oust courts in those states from asserting personal jurisdiction, there is no reason why the same considerations ought not oust California from asserting personal jurisdiction.

[7] To utilize the authorization for nationwide service under 18 U.S.C. § 1965(b), "the court must have personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy and the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators." *Butcher's*

prohibited activities and permits such actions to "be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a). As the Ninth Circuit has recognized, Congress intended RICO's broad reach "to enable plaintiffs to bring all members of a nationwide RICO conspiracy before a court in a single trial." *Butcher's Union*, 788 F.2d at 539.

A leading case from the Fourth Circuit illustrates the way personal jurisdiction applies to civil RICO actions. In *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 621 (4th Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998), a Delaware corporation located in South Carolina instituted a RICO action against a New Hampshire corporation in the federal district court in South Carolina. The record established that the New Hampshire defendant had no offices or sales representatives, no property, and no phone listings in South Carolina. It paid no South Carolina taxes, and no employee had ever traveled to the state "for any purpose." *Id.* at 621. It did have 26 mail-order customers in the state, "constituting 1% of all of its customers and representing .079% of its gross annual sales." *Id.* at 621, 624. The defendant, on just one occasion, purchased $10,000 to $20,000 "worth of parts from a South Carolina supplier." *Id.* at 621. No evidence showed the company ever "targeted formal advertising at South Carolina, having only once published formal advertising in a trade journal of national circulation." *Id.*

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*Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 539 (9th Cir. 1986).

The Fourth Circuit concluded that these contacts were inadequate to convey specific jurisdiction under South Carolina's long-arm statute, *id.* at 626, yet personal jurisdiction could still be asserted under RICO. The court first noted that RICO authorized nationwide service of process, "evidencing Congress' desire that '[p]rovision [be] made for nationwide venue and service of process.'" *Id.* (citing 18 U.S.C. § 1965(d) and quoting H.R. Rep. No. 91–1549, 91St Cong., 2d Sess. at 4 (Sept. 30, 1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4010) (brackets in original). Applying a due-process analysis to whether personal jurisdiction may be had in South Carolina, the Court held that there was "no evidence ... of such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy of allowing the assertion of in personam jurisdiction in South Carolina," as well as supplemental jurisdiction of state-law claims. *Id.* at 627, 628.

The Eleventh Circuit follows the same approach, *see Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935 (11th Cir. 1997), while the Second, Seventh, Ninth, and Tenth Circuits hold, perhaps even more broadly, that RICO "extends personal jurisdiction into 'any judicial district of the United States' if necessary to satisfy 'the ends of justice.'" *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1229 (10th Cir. 2006) (quoting 18 U.S.C. § 1965(b)).

Because personal jurisdiction under RICO extends anywhere in the United States on the basis of a fleeting contact under 18 U.S.C. § 1965(b) without offending due process, the much more substantial contacts Bristol-Myers had related to developing, marketing and selling its drugs in California likewise

does not transgress the limitations imposed by due process.

### D. The Clayton Act Similarly Extends Personal Jurisdiction Beyond What Bristol-Myers Contends Due Process Permits.

Section 12 of the Clayton Act authorizes a similarly broad exercise of personal jurisdiction. Section 12 states:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22. Section 12 establishes both venue and personal jurisdiction in cases with corporate defendants.[8] The section's first clause sets venue broadly, even on the basis of a non-material transaction of business, while the second clause provides for nationwide (even, worldwide) service of process and therefore nationwide personal jurisdiction. *KM Enterprises, Inc. v. Glob. Traffic Techs., Inc.*, 725 F.3d 718, 725 (7th Cir. 2013); *Medical Mut. of Ohio v. deSoto*, 245 F.3d 561, 566-67 (6th Cir. 2001) (due to nationwide service of process, personal jurisdiction exists whenever the defendant has

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[8] For non-corporate defendants, Section 4 of the Act allows suit "in the district in which the defendant resides or is found or has an agent." 15 U.S.C. § 15.

'sufficient minimum contacts with the United States' to satisfy the due process requirements under the Fifth Amendment.") (citation omitted).

While the circuits are split on whether these two clauses must be read together or separately, *see KM Enterprises,* 725 F.3d at 726, either reading supports personal jurisdiction beyond the limits that Bristol-Myers would impose as a matter of due process. Either permitting service "wherever [the corporate defendant] may be found" or wherever venue can be established, which is where the corporate defendant can "be found or transacts business," establishes personal jurisdiction on the most minimal of contacts.

As with the Federal Interpleader Act, Congress enacted the Clayton Act and this approach to personal jurisdiction at a time when *Pennoyer* governed the issue. Service of process, like personal jurisdiction, was viewed restrictively. Under the prevalent jurisprudence, corporations existed only in their state of incorporation so that service on the chief officer of a corporation could only be made there and not when traveling outside the state. 4 Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure § 1066 (4th ed.).

Congress – and the courts in their enforcement of this approach to personal jurisdiction – made the entirely proper judgment that the type of fundamental fairness that due process requires, *see Lassiter,* 452 U.S. at 24 (due process "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty"), is satisfied by a broad approach to personal judgment in the service of justice in the Clayton Act,

as well as the other federal acts sketched here. The more restrained and carefully considered approach adopted in this case by the California courts as compared to these statutes cannot deny due process and ought to be sustained.

### E. Bankruptcy Jurisdiction Would Also Be Implicated by the Due-Process Rule Bristol-Myers Proposes.

Similarly, the due-process concerns raised here would have a devastating effect on the broad jurisdiction granted bankruptcy courts through nationwide service. Fed. R. Bankr. P. 7004(d); *In re Int'l Elec., Inc.*, 557 B.R. 204, 211 (Bankr. D. Kan. 2016). Personal jurisdiction in bankruptcy is thus not measured by "minimum contacts with Kansas; rather, it is whether [parties] have minimum contacts with the United States." *Id.*; *see also Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984).

As a result, a court hearing a bankruptcy proceeding has jurisdiction over every cause of action "related to" the underlying bankruptcy, including those based on state law. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). This Court has treated the "related to" language in bankruptcy, *see* 28 U.S.C. § 157(a), as a "choice of words [that] suggests a grant of some breadth." *Celotex Corp.*, 514 U.S. at 307-08. That same etymological assumption that use of "related to" broadens jurisdictional reach ought to inform this Court's approach to personal jurisdiction's "arise out of or relate to" requirement.

## II. THE MODERN ECONOMY AND EASE OF TRAVEL AND COMMUNICATION ALSO MILITATE TOWARD A FLEXIBLE APPROACH THAT CONSIDERS FACTORS LIKE THOSE RELIED UPON BY CALIFORNIA.

### A. A Balancing of the Inconveniences, in Light of the Corporation's Unquestioned Ability to Litigate in California, Favors Affirmance.

On more than one occasion, this Court has recognized that "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an 'inevitable relaxation of the strict limits on state jurisdiction' over nonresident individuals and corporations." *Burnham v. Superior Court,* 495 U.S. 604, 617 (1990) (quoting *Hanson v. Denckla,* 357 U.S. 235, 260 (1958) (Black, J., dissenting)).[9] In fact, "'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'" *Burger King,* 471 U.S. at 474

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[9] In their landmark law review article relied upon repeatedly by this Court, *see, e.g., Goodyear,* 564 U.S. at 919, von Mehren and Trautman recognize the "growing mobility and complexity of modern life" and the fact that "commercial and economic life [is] increasingly dominated by corporations." Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv. L. Rev. 1121, 1146-47 (1966). In considering the balancing of inconveniences and biases that inform the jurisdictional inquiry, they conclude that biases that favor corporate defendants over ordinary plaintiffs are "harder to justify" given the unequal economic power and legal sophistication between the two. *Id.* at 1147.

(quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). It therefore "usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." *Id.* In fact, even a "lesser showing" of minimum contacts can be overcome with a strong demonstration of fairness, shifting the burden to the defendant to make a "compelling case" that the exercise of personal jurisdiction would be unfair. *Id.* at 477-78.

Here, however, a substantial showing of minimum contacts and purposeful availment was established. *International Shoe* itself recognized that when a non-forum defendant conducts extensive in-forum activities, the "estimate of the inconveniences" of litigation in the forum is sharply curtailed. 326 U.S. at 317-18. Today, it is even less inconvenient than in 1957, when the Court first made that statement about modern conveniences, with the modern advent of online research, face-to-face communications, and ubiquitous travel options. In fact, only in highly unusual cases will that inconvenience rise to a level of constitutional concern. *See Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 116 (1987) (Brennan, J., concurring in part and concurring in the judgment).

Yet, while the business world enjoys the advances that permit that kind of reach, individuals are decreasingly mobile, even more so when burdensome health issues arise, such as is the case when drugs have adverse effects. Studies show that our once increasingly mobile society has seen a steady decline of individual mobility since the 1950s, with the largest average annual declines among populations in their 20s and those aged 65 and older. Douglas A. Wolf and Charles F. Longino, Jr., *Our "Increasingly Mobile Society"? The Curious Persistence of a False Belief,* 45

The Gerontologist 5, 8 (Feb. 2005), available at https://academic.oup.com/gerontologist/article-lookup/doi/10.1093/geront/45.1.5 (last visited Apr. 4, 2017). One exception to that general trend is the continued probability that people will move once they retire. *Id.* at 8. After that move, however, people are likely to stay put.

Those modern facts demonstrate why considerations of inconvenience, an important factor in our personal jurisdiction jurisprudence, favors permitting plaintiffs to hold corporate tortfeasors with large in-state footprints, already subject to similar lawsuits in that state, accountable in the most convenient locale.

An exemplar of that issue of the retiree massively inconvenienced by being forced to file his action in a former place of residence is now pending in the Eleventh Circuit.[10] In *Waite v. AII Acquisition Corp.*, No. 16-15569 (11th Cir. 2016), the defendant, Union Carbide, is engaged in similar activities in Florida to what it does in Massachusetts, where the plaintiff was first exposed to its asbestos. He later moved to Florida, where he is now retired, but worked for a time and suffered further asbestos exposure from other employers. His current diagnosis of the inevitably fatal mesothelioma is based on his continuing exposure and manifests itself only after a long latency period. A person who contracts an asbestos disease generally may not bring an action until it manifests itself. *Eagle-Picher Indus., Inc. v.*

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[10] That fact pattern also demonstrates why the GSK amicus brief's contention that the location of plaintiffs' treating physician favors an inflexible rule that should limit specific jurisdiction to the place of injury cannot be correct. *See* GSK Am. Br. 15-17, *supra* n.6.

*Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985), *rev. denied*, 492 So. 2d 1331 (Fla. 1986); *cf. Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432 (1997) (collecting cases). In Florida, that requirement is codified in the Asbestos and Silica Compensation Fairness Act, which requires actual physical impairment and specifies the necessary diagnosis before suit may be brought. Fla. Stat. § 774.201 *et seq.* Nonetheless, after Mr. Waite manifested the disease and sued in Florida (where Union Carbide defends countless asbestos suits), Union Carbide asserted a lack of personal jurisdiction. The facts are illuminating and so discussed at length.

Union Carbide could only be named a defendant at this point by Mr. Waite, and splitting his claims against Union Carbide from the companies exposing him to asbestos in Florida would require that he split his actions. Meanwhile, it is clear that Union Carbide has a substantial related presence in Florida. Union Carbide "has been registered to do business in Florida and maintained a registered agent to receive service of process in Florida since 1949." *Waite v. AII Acquisition Corp.* ("Waite I"), No. 15-cv-62359-BLOOM/Valle, 2015 WL 9595222, at *4 (S.D. Fla. Dec. 29, 2015). It grew to be the largest supplier of asbestos for drywall compound and targeted the Florida market for its product and continues to have "dozens of Florida customers who purchased its asbestos." *Id.* Union Carbide owned and operated a plant in Brevard County, Florida until 1987. *Id.* Its shipping terminal in Tampa has now become an environmental Superfund site. *Id.*

In addition, Union Carbide is also no stranger to asbestos litigation in Florida. As the District Court detailed:

> Union Carbide has been a defendant in numerous, recent cases litigated in Florida, including asbestos cases involving exposures to its "Calidria" brand asbestos, as implicated here. *See, e.g., Union Carbide Corp. v. Kavanaugh,* 879 So. 2d 42 (Fla. 4th Dist. Ct. App. 2004); *McConnell v. Union Carbide Corp.,* 937 So. 2d 148 (Fla. 4th Dist. Ct. App. 2006). Indeed, the Florida Supreme Court recently affirmed the lower court's decision finding liablity [sic] for Union Carbide for the very same conduct alleged in the present case. *See Aubin v. Union Carbide Corp.,* 2015 WL 6513924, at *17-18 (Fla. Oct. 29, 2015).

*Id.* at *5.

This wide array of connections to the State of Florida, related to Mr. Waite's litigation, satisfies the "constitutional touchstone" of purposefully established minimum contacts by the defendant in the forum State. *Burger King,* 471 U.S. at 474. Unquestionably, Union Carbide "purposefully directed" its activities into Florida. *Cf. Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774 (1984). Union Carbide has "purposefully 'reach[ed] out beyond' [its] State and into another by, for example, entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum State," or by distributing its product to "'deliberately exploi[t]' a market in the forum State." *Walden v. Fiore,* 134 S. Ct. 1115, 1122 (2014) (citations omitted). Jurisdiction, based on these contacts, does not constitute the type of "random, fortuitous, or attenuated" contacts made with other persons

affiliated with the State that has proven fatal in other cases. *See Burger King*, 471 U.S. at 475. A balancing of the inconveniences between Mr. Waite being forced to go to Massachusetts to sue Union Carbide while maintaining an action in Florida against other defendants, or forcing Union Carbide to defend itself in Florida in one consolidated action, plainly favors the latter.

Moreover, defendants in both this case and *Waite* seek the splitting of a cause of action between two jurisdictions because there are multiple defendants with differing jurisdictional bases. To permit that argument to succeed creates an enhanced danger that corporations, engaged in profitmaking interstate activities, will "escape having to account ... for consequences that arise proximately from such activities." *Id.* at 473-74.

Instead, both cases constitute the type of purposeful availment that seeks the "privilege of conducting activities within the forum . . ., thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253. As in the instant case with the extensive California presence of like activities that Bristol-Myers has, the minimum contacts requirement for Union Carbide to satisfy due process is established. Because both corporations are involved in similar activities in the state of suit, where they are prepared to, and actually must, defend themselves against in-state plaintiffs, the litigation should be viewed as resulting from alleged injuries that "arise out of or relate to" those activities. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). This requirement assures that a defendant's "conduct and connection with the forum ... are such that he should reasonably anticipate being

haled into court there." *World-Wide Volkswagen Corp*, 444 U.S. at 297.

This Court has never defined the difference between arising out of and related to, *see Helicopteros*, 466 U.S. at 415 n.10, and has warned against using "mechanical or quantitative" tests. *International Shoe*, 326 U.S. at 319. *See also Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) ("Like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."). California's approach to that issue in this case followed those directions.

### B. Contemporary Norms Disfavor the Proximate-Cause Test Proposed by Bristol-Myers.

Bristol-Myers urges this Court to adopt a rigid *Pennoyer*-like geographic-based proximate cause test that would deny specific jurisdiction if a plaintiff's injury did not directly arise from a defendant's actions within the forum. Pet. Br. 37-38. Such an approach would constitute the kind of "mechanical" test that *International Shoe* rejected. 326 U.S. at 319. It is also inconsistent with this Court's recognition that a plaintiff's "lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Keeton*, 465 U.S. at 780.

Significantly, in every case where relatedness was at issue, this Court has consistently found that a corporation's purposeful presence in a state is sufficient to satisfy specific jurisdiction's relatedness

requirement. It has done so precisely because relatedness can connect a defendant's general interstate economic activities to an injury. For example, in *Burger King*, the Court held specific jurisdiction existed because the company's general "economic activities" in the state assured that it would not be "unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." 471 U.S. at 474 (quoting *McGee*, 355 U.S. at 223 (internal quotations omitted)). The Court further held that

> where individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; *the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.*

*Id.* (emphasis added).

Where this Court has denied jurisdiction, the common denominator is highly attenuated connections to the forum state. For example, in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the case involved Argentinian plaintiffs who sued Daimler for actions taken by Daimler's Argentine subsidiary by asserting the California presence of the German company's independently incorporated, indirect U.S. subsidiary. The "Rube Goldberg" approach to connecting a U.S. company to an Argentine one through a German parent was what doomed the enterprise. On the contrary, this Court has not found

constitutional concerns to predominate where the defendant has decades of substantial and ongoing operations in the state, including actions identical to the tortious conduct for which they are being sued in the case at bar.

Here, there is no unfairness in subjecting Bristol Myers to potential liability in California, where it will litigate the same precise liability to other plaintiffs in that forum. Allowing California to assume jurisdiction here does not comprise an instance of haling a defendant into a forum that it is neither prepared to litigate in nor lacked expectation of litigation exposure. For that reason, rather than require a causal relationship of the type Bristol-Myers propounds, the proper inquiry at this stage is a relatedness question. Here, that question, based on the facts, must be answered affirmatively.

Moreover, this Court sketched out four elements that ought to be the centerpieces of the inquiry: (1) the burden imposed on the defendant by requiring it to litigate in a foreign forum; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in obtaining relief; and (4) the interests of the other affected forums in the efficient judicial resolution of the dispute and advancement of substantive social policies. *Asahi*, 480 U.S. at 113.

The answers to those questions, which the California Supreme Court undertook itself, inexorably favors affirmance. California has an indisputable interest in resolving litigation involving its own citizens as plaintiffs and defendant (McKesson), grounds for its resolving it and affording appropriate relief, and the lack of any other forum with a similarly predominant interest. The burden to Bristol-Myers of

defending all the cases, resident and non-resident, is minimal, while yielding a desirable efficiency and furthering an important public policy in proper warnings shared by the states. In fact, as the California Supreme Court observed, the burden of litigating the claims of the nonresident plaintiffs "in a scattershot manner" in "up to 34 different states ... would seem to be a far more burdensome distribution of BMS's resources in defending these cases than defending them in a single, focused forum." Pet. App. 37a-38a.

Nothing in the California Supreme Court's decision below undermines this Court's holding that a common connection links the defendant, the forum, and the litigation. For example, in *Walden,* this Court did not limit its specific jurisdiction inquiry to whether the defendant purposely availed itself of the forum and whether the claim related to those specific contacts. The *Walden* Court, instead, engaged in a reasonableness inquiry that examined the defendant's relationship to the forum, the plaintiff's relationship to the defendant and the forum, and *the relationship of the claim to the litigation.* 134 S.Ct. at 1122. The emphasis, then, is not on injury-related conduct, but on whether "the defendant's suit-related conduct ... create[d] a substantial connection with the forum." *Id.* at 1121. Where the defendant in Walden lacked contact with Nevada in any meaningful way, the same cannot be said of Bristol-Myers and California.

Under this analysis, just as the California Supreme Court undertook utilizing the *Asahi* factors, the connections are self-evident. Bristol-Myers has a significant relationship to the forum and will litigate the issues in this matter there. The nonresident plaintiffs have a cognizable cause of action against

Bristol-Myers's national distributor, McKesson, there and are properly before the California courts. Finally, the claim made by the nonresidents is identical to the claim made in the litigation by resident plaintiffs, providing a cogent relationship between the claim and the litigation. *Cf. Goodyear*, 564 U.S. at 919 ("specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'") (citation omitted).

Interestingly, Bristol-Myers sees no jurisdictional issue in plaintiffs filing "in federal court and participat[ing] in the multidistrict litigation process, rather than structure their complaints to avoid federal subject matter jurisdiction [and pursue their claims in state court]." Pet. Br. 14. The statement signals that it would consent to jurisdiction before a multidistrict panel. Yet, no viable legal distinction exists that would justify submitting to personal jurisdiction to adjudicate the matter before a federal court and submission to jurisdiction before a state court that unquestionably has jurisdiction to adjudicate the dispute for all plaintiffs and at least one defendant.

In essence, Bristol-Myers asks this court to accord lesser stature to state courts than it does to federal courts, but this Court has repeatedly recognized that it should be guided by "expedition and sensitivity to state courts' coequal stature." *See, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-88 (1999). After all, "[i]n determining whether a nonresident defendant is subject to its jurisdiction, a federal court exercising diversity jurisdiction is the functional equivalent of a state court sitting in the forum state." *Daynard v. Ness, Motley, Loadholt,*

*Richardson & Poole, P.A.*, 290 F.3d 42, 51 (1st Cir. 2002) (citation omitted).

Finally, recognizing personal jurisdiction in the circumstances presented here has distinct advantages that serve the interests of both parties and of justice. It provides a unitary forum in which a uniform adjudication of shared facts among similarly situated plaintiffs can be established, particularly, as here, where Bristol-Myers' suggested approach would force non-California residents to adjudicate their cases for redress against McKesson, the distributor, in California and their identical case against Bristol-Myers elsewhere. Recognizing jurisdiction in California avoids duplicative separate actions that unquestionably exhaust resources from both parties and thus invariably favors the deeper-pocket party. Further, it reduces the risk that similarly situated claimants will end up with widely disparate relief.

## CONCLUSION

For the foregoing reasons, the Court should affirm the California Supreme Court.

Date: April 7, 2017

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RECORD AND BRIEFS

No. 16-466

FILED
APR 7 2017

In The

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, ET AL.,

*Respondents.*

**On Writ Of Certiorari To
The California Supreme Court**

## BRIEF OF *AMICUS CURIAE* ASBESTOS DISEASE AWARENESS ORGANIZATION IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE *AMICUS CURIAE*[1]

The Asbestos Disease Awareness Organization ("ADAO") is an international nonprofit organization comprised of asbestos victims, workers, and professionals dedicated to the prevention of asbestos-caused diseases. In 2004, Linda Reinstein and Doug Larkin founded ADAO after their lives were forever changed when their loved ones were diagnosed with mesothelioma, a cancer associated with asbestos exposure. Since that time, ADAO has become a network of more than 40,000 people and organizations dedicated to protecting public health from the known dangers of asbestos. Beginning in 2005, ADAO has organized annual international conferences bringing together leading experts to discuss advancements in early detection and new treatments, prevention, and global advocacy. Furthermore, ADAO serves as a congressional witness and stakeholder in legislative discussions.

ADAO's goals are to eliminate asbestos diseases, including mesothelioma, through education and advocacy, and to provide support and community for the victims of asbestos disease and their families. ADAO files this brief to alert the Court to the unintended

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[1] All parties have submitted letters to the Clerk granting blanket consent to the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, ADAO affirms that no party or counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. The brief was funded by ADAO, its counsel, and the law firm of Waters Kraus & Paul of Dallas, Texas; no other person or entity made a monetary contribution to the preparation of this brief.

consequences that would result from acceptance of Petitioner's view that the exercise of specific personal jurisdiction by a court over a defendant whose forum contacts were not a proximate cause of the injuries at issue violates the Due Process Clause. Specifically, ADAO will explain that Petitioner's restrictive definition of specific personal jurisdiction is impractical in asbestos and other toxic tort cases and unnecessary to vindicate Petitioner's ability to have claims against it adjudged in an appropriate forum.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Cases involving latent injuries caused by toxic substances encountered at the workplace, at home, or during military service are a fixture of our current legal landscape. Such cases often involve a worker or consumer using a variety of products containing the same toxic ingredient over a period of time in several different states or in a foreign country. All suppliers of the products to which the worker or consumer was exposed are potentially liable for the injuries caused by the products because they all contributed to the injury. In many of these cases, it would be sheer coincidence if there were one state in which either the worker or consumer had contact with each supplier's product or the supplier could be said to be "at home."

Historically, plaintiffs in such cases have been able to sue all or most potential tortfeasors in a single suit

in a single jurisdiction under pragmatic concepts of general and specific jurisdiction. For example, a plaintiff who contracted asbestos-related mesothelioma in Texas caused by asbestos exposure at worksites in Texas, Louisiana, Arkansas, and Oklahoma could sue all suppliers in a single action in Texas. The suppliers to whose products the plaintiff was exposed in Texas were subject to specific jurisdiction in Texas; the suppliers of the products to which the plaintiff was exposed in other states were usually subject to jurisdiction based on their designation of a registered agent and qualification to do business there. Not only did the assertion of jurisdiction over such nonresident defendants comport with fairness, judicial economy, and common sense, but it also drew virtually no resistance from the nonresident defendants. Thus, the legal record is devoid of any holding by any court in any jurisdiction that the exercise of personal jurisdiction over nonresidents sued in these types of cases violates rights protected by the Due Process Clause.

But the new version of "due process" advanced by Petitioner Bristol-Myers Squibb Company ("BMS") threatens to dismantle this common-sense construct of personal jurisdiction in toxic tort litigation. In the scenario described above, under BMS's formulation of due process the suppliers who qualified to do business in Texas and who supplied to Texas the same sort of products that injured the plaintiff there but who could not be said to be "at home" in Texas and whose products were not encountered by the plaintiff in Texas could

not be sued there. The plaintiff could sue these nonresidents in their "home" jurisdictions or in the states of the exposure, resulting in a multiplicity of duplicative actions burdensome for the plaintiff (but not for the defendants) and costly for the courts. Or the plaintiff could forego suing the nonresidents and require the residents to bear the entire liability, leaving it to them to assert claims for contribution against the nonresidents in the states where they could be sued.

This type of unfairness and administrative chaos cannot be justified under the Due Process Clause and under the Court's jurisprudence on personal jurisdiction. As the Court has made clear in many opinions outside the context of personal jurisdiction, due process cannot be reduced to a narrow formula. And even the Court's opinions on personal jurisdiction have eschewed the application of mechanical tests and have emphasized the need to weigh the facts of each case in determining whether the exercise of jurisdiction comports with due process. BMS's rigid formulation of specific jurisdiction does not comply with these practical and necessarily flexible considerations.

BMS and its supporting *amici curiae* complain that the flexible concept of specific jurisdiction applied by the California Supreme Court would potentially subject them to personal jurisdiction in all fifty states, would improperly expand California's sovereignty to determine the consequences of acts in other states, and would clog the California courts with cases having little nexus to the state to the detriment of California residents. But having engaged in virtually identical

conduct upon which the alleged tort is based in all fifty states, BMS and companies like it should already expect to be haled into court in each state. Already existing constitutional limitations on choice of law protect defendants like BMS from the arbitrary imposition of California legal standards on those defendants' activities in other states. And the practical difficulties of defending against claims brought by nonresidents are more comprehensively and appropriately addressed by application of the doctrine of forum non conveniens and by proper application of joinder and severance rules than by expanding due process limitations on personal jurisdiction. The California Supreme Court properly concluded that because BMS's marketing of Plavix in California "relates to" the Plavix claims before it, the exercise of personal jurisdiction over BMS does not violate the Due Process Clause. The Court should affirm the decision of the California Supreme Court.

## ARGUMENT

### I. Under BMS's Constricted View of Specific Jurisdiction, Many Toxic Tort Claims Involving a Single Plaintiff and Multiple Defendants Could Not Be Addressed in a Single Suit, Leading to Both Unjust and Extremely Inefficient Results.

Toxic tort cases frequently involve latent injuries caused by workplace exposure to chemicals or other toxic substances over a period of time, often many

years. Because the injuries in such cases do not result from a single exposure or incident but from the cumulative effect of many years of exposure, the contact between the plaintiff and the defendants' products often occurs in many states. Commentators have often noted the frequent multi-state nature of asbestos litigation in particular and of toxic tort litigation in general. *See, e.g.*, Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 240-41 (4th ed. 1996) ("In the Asbestos Workers' Union, men traveled all over the country doing contract work on the construction and maintenance of industrial plants, power plants, and ships. Disease developed long after the exposure, and it was not uncommon for a man to find out he had asbestosis or cancer after he had moved far from the scene of the crime, so to speak."); Lynn D. Carson, *Choice of Law Issues in Mass Tort Litigation*, 56 J. Air L. & Com. 199, 207 (1990) ("Often the person seeking compensation for this disease has worked with asbestos products in a number of different states over many years."); Elinor P. Schroeder, *Legislative and Judicial Responses to the Inadequacy of Compensation for Occupational Disease*, 49 Law & Contemp. Probs. 151, 164 (Autumn 1986) ("The mobility of our society and the long latency periods of many occupational diseases make it probable that the worker was exposed in several different states during a working life, making the availability of a favorable forum totally fortuitous.").

The likelihood that corporate activities in multiple jurisdictions could combine to cause injury in a toxic tort case was apparent from the dawn of toxic tort

litigation itself. In *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973), the court noted that the plaintiff was exposed to asbestos over a 33-year career "usually in Texas," clearly indicating that the plaintiff sustained exposure in other states as well. Over the years, the courts supervising asbestos litigation and other types of toxic tort cases have routinely noted the plaintiff's contact with the defendants' products in multiple jurisdictions. *See, e.g.*, *In re New York City Asbestos Litig.*, 757 N.Y.S.2d 293, 294 (2003) ("The general import of Taylor's testimony was that he used AO's asbestos products during his various employments with some 29 companies in several different states."); *Byers v. Lincoln Elec. Co.*, 607 F. Supp.2d 840, 847 (N.D. Ohio 2009) ("Byers was exposed to these welding fumes in 15 different states, so all of these states may be construed as his 'place of injury.'").

Another scenario often encountered in toxic tort litigation is the case in which a plaintiff encounters a toxic substance outside the territorial limits of any of the United States. Such exposure may occur while the plaintiff is serving abroad in the military or working aboard ship as a merchant mariner. *See, e.g.*, *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 373 (6th Cir. 2001) (plaintiff exposed over "four and a half decades" aboard "eighty different ships"); *In re Asbestos Litig.*, No. CV 13-229-SRF, 2015 WL 5766460, at *1 (D. Del. Sept. 30, 2015) (plaintiff exposed aboard ship in the United States Navy from 1954 to 1974). The plain-

tiff likely was exposed to the products of multiple suppliers during this service. *See, e.g.*, *In re Asbestos Litig.*, 2015 WL 5767460, at *1 (plaintiff able to withstand five of twelve motions for summary judgment).

In the first scenario, in which the plaintiff is exposed to products made by many companies in different states over a long career, it is foreseeable if not inevitable that the plaintiff will have been exposed to a different company's products in each state. In other words, the plaintiff, a resident of State D, may have been exposed to Company A's products in State A, to Company B's products in State B, and to Company C's products in State C. In the second scenario, by definition, there is no state in which the companies' in-state activities were a proximate cause of the plaintiffs' latent injuries. And in both scenarios, it would be a sheer fortuity if the companies were "at home" and thus subject to the exercise of general jurisdiction in the same states.

Nevertheless, for decades the courts have allowed plaintiffs in toxic tort cases to sue multiple defendants in a single action even if the plaintiff could not show exposure to each defendant's products in the forum state. The rationales supporting this pragmatic approach varied. Some courts reasoned that by becoming authorized to conduct business and appointing an agent to receive service of process in the state, a corporation effectively consents to the exercise of personal jurisdiction on all causes of action. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 634 & n. 115 (1988) (citing *Dombroff v. Eagle-*

*Picher Indus.*, 450 So.2d 923 (Fla. Dist. Ct. App. 1984) (per curiam)). Other courts relied on the notion that a corporation could be subject to the general jurisdiction of the forum if it had continuous and systematic business contacts in the forum state. *See Genuine Parts Co. v. Cepac*, 137 A.3d 123, 129-30 (Del. 2016) (noting that this was the prevailing understanding "until recently"). In any event, defendants in toxic tort cases rarely if ever challenged the exercise of personal jurisdiction over them even if the plaintiff was not exposed to the defendants' products in the forum state so long as the defendant had some significant presence in the forum.

This changed in the wake of this Court's opinion in *Daimler AG v. Bauman*, 134 U.S. 746 (2014). Emboldened by language in *Daimler*, defendants in toxic tort cases began seeking dismissals on jurisdictional grounds, asserting that their due process rights were being infringed by being haled into court in jurisdictions in which their conduct had not contributed to the plaintiff's injury. They made these assertions even though they had substantial contacts in these jurisdictions, could claim no inconvenience in responding to the suit, and could propose no more appropriate jurisdiction to adjudicate the claims.

For example, in *Waite v. AII Acquisition Corp.*, No. 15-cv-62359, 2016 WL 2346743 (S.D. Fla. May 4, 2016), the plaintiff developed mesothelioma in Florida after working with a variety of asbestos products in Florida and Massachusetts. He and his wife sued ten defendants, including Union Carbide Corporation, in Florida. Union Carbide moved to dismiss the claim against

it, arguing that it was not subject to the general jurisdiction of the Florida court because it was not "at home" in Florida, and that the Florida court could not exercise specific jurisdiction over it because the plaintiff was exposed to Union Carbide's products only in Massachusetts. The district court agreed that Union Carbide was not subject to general jurisdiction in Florida, *id.* at *1, and then considered whether Union Carbide's contacts would support the exercise of specific jurisdiction.

The district court acknowledged Union Carbide's extensive contacts with the state, including its maintenance of a registered agent to receive service of process in Florida since 1949, its sales of massive quantities of asbestos in Florida during the same time that the plaintiff was exposed to its asbestos in Massachusetts, and its participation in litigation in Florida as a plaintiff and as a defendant. *Id.* at *3. The court then undertook to determine whether the plaintiff's cause of action "arose out of or was related to" those contacts. Recognizing that this Court had not established a specific approach for determining whether a defendant's jurisdictional contacts were sufficiently "related to" the cause of action to support the constitutional exercise of jurisdiction, the district court expressed the view that "a minimum contacts finding requires that a defendant's suit-related conduct constitute the 'but-for' cause of the tort at issue." *Id.* Based on this "but-for" test, the court concluded that "[e]ven if Union Carbide was in fact shipping the same materials to Florida at the same time Mr. Waite came into contact with those

materials in Massachusetts," those contacts "do not 'relate to' Mr. Waite's cause of action sufficiently to confer jurisdiction on this Court." *Id.* at *4. In the court's view, the exercise of jurisdiction over Union Carbide on Mr. Waite's asbestos claim – despite Union Carbide's extensive asbestos-related contacts in Florida – rose to the level of a due process violation. According to the court, Mr. Waite could sue Union Carbide in Massachusetts, where he was exposed to its products, or in the states where it was "at home." Mr. Waite's claim against Union Carbide's co-defendant Ford Motor Company, whose products Mr. Waite encountered in Florida, continued to proceed in the Florida court. *See Waite v. AII Acquisition Corp.*, 192 F. Supp.3d 1298 (S.D. Fla. 2016) (pretrial rulings on Mr. Waite's claims against Ford).[2] Thus, both Mr. Waite and Ford would have to file a largely duplicative lawsuit in another state to vindicate their rights, despite Union Carbide's unquestioned ability to defend itself in Florida.

BMS advocates an approach to specific jurisdiction similar to that embraced by the district court in *Waite*. The court in *Waite* required the defendant's forum contacts to be a "but-for" cause of the tort; BMS would go one step further and require the in-state contacts to be the proximate cause of the tort. But the results produced by the BMS approach to specific jurisdiction, identified below, are intolerable, particularly in toxic tort cases. Moreover, compliance with the

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[2] The district court's jurisdictional dismissal is now on appeal. *Waite v. AII Acquisition Corp.*, No. 16-15569 (11th Cir. 2016).

Due Process Clause does not require these untenable results, as demonstrated in Part II of this Brief.

### A. In many multi-state toxic tort cases, BMS's approach to specific jurisdiction would force plaintiffs to bring separate suits in multiple jurisdictions or lose the opportunity to obtain full compensation.

As commentators have noted, many jurisdictions "have abandoned the doctrine of pure joint and several liability in toxic-tort cases and have instead enacted systems for apportioning liability." Laura Kingsley Hong & Robert E. Haffke, *Apportioning Liability in Asbestos Litigation: A Review of the Law in Key Jurisdictions*, 26 T.M. Cooley L. Rev. 681, 682 (2009) (footnote omitted). In those jurisdictions, absent the coincidence that the defendants shared states in which they were "at home" or contributed to the plaintiff's toxic exposure, the plaintiff would have to bring as many suits as there are defendants that contributed to the injury to have the chance to be fully compensated. In *Waite*, the district court contemplated a minimum of two lawsuits to provide the plaintiff with an opportunity for a full recovery. In a more typical toxic tort case, in which the plaintiff was exposed to different companies' products "all over the country" (Castleman, *supra* at 240), the number of separate suits would be far greater. *See, e.g.*, *Byers v. Lincoln Elec. Co.*, 607 F. Supp.2d at 847 (15 different states could be considered plaintiff's "place of injury").

Many toxic tort cases – such as those involving mesothelioma, a cancer associated with asbestos exposure[3] – are brought by terminally ill individuals. These victims of mesothelioma might understandably forego the expense and emotional burden of bringing multiple suits at the same time in different parts of the country to recover for the same toxic injury. But in states that do not impose joint and several liability on every liable defendant, the consequence of such a decision would be severe; for every defendant spared, the plaintiff would be relinquishing a proportionate part of the claim.

In any event, the expanded due process right claimed by BMS would also frustrate the substantive policy interest adopted in many states of expediting and simplifying the litigation process for victims of mesothelioma. Recognizing that the delays and hardship of litigation are even more acutely felt by victims of this terrible disease than by other types of litigants, some state legislatures have enacted statutes specifically providing for the acceleration of mesothelioma cases. *See* Tex. Civ. Prac. & Rem. Code § 90.010(c) (requiring the state's MDL court to expedite claims for mesothelioma and other specified terminal occupational diseases); S.C. Code Ann. § 44-135-50 (providing that persons that received a diagnosis of mesothelioma

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[3] The horrific symptoms of mesothelioma are graphically described in Justice Kennedy's opinion in *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 168 (2003) (Kennedy, J., concurring in part and dissenting in part).

may apply for an expedited trial setting). In other jurisdictions, mesothelioma cases are accelerated under state statutes generally providing for expedited resolution of cases involving terminally ill or elderly claimants. *See, e.g.*, *Boyd v. Superior Court*, No. A143511, 2014 WL 6700643, at *1-*2 (Cal. Ct. App. Nov. 26, 2014) (applying Cal. Civ. Proc. Code § 36); *Taylor v. Georgia-Pacific, LLC*, No. 15-22280-CIV, 2015 WL 3902596, at *1 (S.D. Fla. Jun. 24, 2015) (applying Fla. Stat. § 415.1115); *In re New York City Asbestos Litig.*, 59 N.E.3d 458, 465 (N.Y. 2016) (applying N.Y.C.P.L.R. 3403). But the new rule proposed by BMS would undermine the ability of mesothelioma victims to obtain a speedy resolution of their claims by inviting motions to dismiss based on lack of personal jurisdiction of the type that the courts have not previously seen.

The Due Process Clause, as BMS points out, protects defendants from being haled into a court that has no connection either with the defendant or the case. It also guarantees claimants the right to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Balanced against the plaintiff's right to be heard, the defendant's due process objection to the exercise of jurisdiction in which the defendant conducted the same type of activities that caused the plaintiff's injuries is not compelling.

### B. BMS's narrow view of specific jurisdiction will impair the ability of defendants to obtain contribution from nonresident tortfeasors.

In jurisdictions that retain some form of joint and several liability, a plaintiff with an injury caused by multiple tortfeasors can obtain all damages from a single defendant. *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 163-64 (2003). Historically, defendants targeted in such a manner have mitigated their disproportionate liability by asserting cross-claims or third-party claims against other potentially liable companies or by obtaining a jury finding of the other companies' percentage of responsibility in causing the plaintiff's injury. But defendants can assert claims for contribution against, or otherwise allocate liability to, only tortfeasors that are subject to the personal jurisdiction of the court. *See, e.g.*, 6 Charles A. Wright, et al., *Federal Practice and Procedure* § 1445 (3d ed. 2012) ("The cases unanimously hold that a federal court must obtain personal jurisdiction over a third-party defendant before it proceeds to adjudicate a third-party claim."); *In re New York City Asbestos Litig.*, 750 N.Y.S.2d 469, 479 (N.Y. Sup. Ct. 2002) (defendant cannot obtain a finding of the share of liability of a bankrupt entity if "the plaintiff proves that he or she with due diligence could not obtain personal jurisdiction over the bankrupt or its estate"), *aff'd*, 775 N.Y.S.2d 520 (N.Y. App. Div. 2004). By making it more difficult for defendants in toxic tort cases to apportion liability among their co-tortfeasors,

BMS's cramped view of specific jurisdiction would actually magnify the effects of joint and several liability.

### C. BMS's rule would force courts to preside over multiple actions for the same injury, multiplying the burden faced by the judicial system of resolving asbestos litigation and other toxic torts.

The courts, including this Court, have considered a variety of proposals for reducing the burden on the courts, on litigants, and on society imposed by mass tort litigation in general and asbestos litigation in particular.[4] Until now, no court, nor even a single commentator, has thought it advisable *to expand* the scope of the litigation by requiring the assertion of multiple claims *based on the same injury by the same plaintiff.* But that would be the inevitable effect of the adoption of BMS's view of specific jurisdiction. Plaintiffs asserting direct claims, and defendants asserting claims for contribution, would have to sue each tortfeasor where the plaintiff was exposed to its product or where the tortfeasor is "at home." Aside from the cost and burden that the mere filing of these duplicative claims would

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[4] *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (opt-out class action); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (mandatory, "limited fund" class action); *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990), *aff'd in part and vacated in part*, 151 F.3d 297 (5th Cir. 1998) (single bellwether trial with causation and damages findings extrapolated); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982) (collateral estoppel applied against nonparties to prior action).

impose on the judicial system, the actual resolution of these claims would be complex in ways that cannot now be predicted. Would the claims proceed simultaneously or would they be staged? How would discovery be coordinated, if at all? What effect would factual findings and legal rulings issued in one proceeding have on the other? These and other questions of procedure would needlessly vex the state and federal courts for decades. Toxic tort litigation is difficult enough for the courts without the new costs, complexities, and burdens that would be visited on them by adoption of BMS's novel theory of due process.

## II. The Burden on Defendants in Defending Toxic Tort Cases in Jurisdictions in Which They Maintain Minimum Contacts That Are Not the Proximate Cause of the Plaintiff's Injuries But That Are Related to the Cause of Action Does Not Rise to the Level of a Due Process Violation.

BMS and its supporting *amici curiae* argue that the Due Process Clause demands a direct causal relationship between the defendant's forum contacts and the plaintiff's claim to support the exercise of specific personal jurisdiction. They criticize the California Supreme Court's "sliding scale" approach as "inconsistent" with this Court's decisions, U.S. Br. 17,[5] and

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[5] The briefs of the *amici curiae* supporting petitioner are cited as follows: Brief for the United States, "U.S. Br."; Brief of GlaxoSmithKline, LLC, "GSK Br."; Brief of the Product Liability Advisory Council, "PLAC Br."; Brief of DRI – The Voice of the

assert that "[c]ourts cannot compensate for the lack of a causal link between the forum and the litigation by pointing to a stronger link between the defendant and the forum." BMS Br. 33. They add that the expansive standard for specific jurisdiction applied by the California Supreme Court facilitates "inappropriate" forum shopping, permitting "the aggregation in 'magnet' jurisdictions where the only meaningful connection with the forum is the claimant's decision to take advantage of its plaintiff-friendly courts." GSK Br. 6; PLAC Br. 12.

But the California Supreme Court's holding does not conflict with this Court's precedents on specific jurisdiction. Instead, it faithfully applies due process concepts developed by this Court both in the context of personal jurisdiction and in other relevant contexts. And the supposed evil of forum-shopping is more appropriately controlled by application of other procedural safeguards, such as choice-of-law limitations, the doctrine of forum non conveniens, and joinder and severance rules. The remedy proposed by BMS – a holding that due process requires a proximate causal connection between the defendant's forum-state contacts and the plaintiff's injuries to support the exercise of specific jurisdiction – would in many cases prevent the exercise of jurisdiction in the plaintiff's home state, even if the defendant had substantial contacts there. BMS seeks due process overkill; in contrast, the balanced and pragmatic approach of the California Supreme

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Defense Bar as "DRI Br."; and Brief of the Chamber of Commerce of the United States of America, et al., "Chamber Br."

Court is supported by this Court's due process jurisprudence and should be approved by the Court.

### A. This Court's Due Process Jurisprudence Supports the California Supreme Court's Approach to Specific Jurisdiction.

BMS posits the test for determining the validity under the Due Process Clause of an exercise of personal jurisdiction as an inflexible one requiring that the cause of action not just be "related to" the defendant's contacts within the forum but that they "arise" out of those contacts. Of course, it can cite no Supreme Court case in which the Court has required such a causal relationship. Instead, it parses language from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) to suggest that the Court there "made plain it regarded 'arises from' and 'related to' as two sides of the same coin." BMS Br. 21. Despite BMS's insistence that language in *International Shoe* and its progeny dictate the recognition of a causal requirement in specific jurisdiction cases, several district courts have agreed that this Court has not "established a specific course for district courts to follow in deciding whether a nonresident defendant's contacts are sufficiently related to the plaintiff's claims." *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp.3d 1303, 1316-17 (N.D. Ga. 2014); *Waite v. AII Acquisition Corp.*, No. 15-cv-62359, 2016 WL 2346743 (S.D. Fla. May 4, 2016) at *3. The Court is not confined by its precedent to adopt BMS's "proximate causation" requirement.

As the Court has made clear, the formula for specific jurisdiction is not an end in itself, but represents the Court's attempt to define, in practical and more specific terms, when the exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. The Court "long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests," and has "reject[ed] any talismanic jurisdictional formulas." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 485 (1985). "[T]he facts of each case must [always] be weighed in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" *Id.* at 485-86 (quoting *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978)).

The flexible approach that the Court has adopted in its personal jurisdiction due process jurisprudence is consistent with its application of the Due Process Clause generally. As the Court has observed, "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstance," but "is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citations omitted); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring) ("'due process' cannot be imprisoned within the treacherous limits of any formula."). The Court's supervision of personal jurisdiction through application of the Due Process Clause "fit[s] within a

fundamental rights/rationality balancing model consistent with other strands of substantive due process." Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 Tul. L. Rev. 567, 619 (2007). BMS's criticism of the California Supreme Court for adopting a "sliding-scale," or balancing, analysis in deciding whether to protect a defendant from the exercise of specific jurisdiction ignores the roots of the protection in the Due Process Clause.

As the Court noted in *Daimler AG v. Bauman*, in *International Shoe* the Court observed that while "single or occasional" acts may be enough to subject a corporation to the exercise of personal jurisdiction by the forum for claims "related to" those acts, "continuous corporate operations" may be "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Daimler*, 134 S. Ct. 746, 754 (2014) (quoting *International Shoe*, 326 U.S. at 318). This case presents a hybrid of the two scenarios; the acts of the defendant in the forum state were certainly not isolated or occasional, but were not substantial enough to support the description of the defendant as "at home" there. In her 1988 article *The Myth of General Jurisdiction*, which was discussed by the Court in *Daimler* (134 S. Ct. at 752), Professor Mary Twitchell described the approach then taken by courts in such "middle-ground" cases:

> [C]ontemporary courts are using a fictional, or 'conditional,' general jurisdiction to solve a

> theoretical impasse within specific jurisdiction analysis. . . . Courts turn to general jurisdiction analysis in cases involving tenuous ties not because they feel that those ties warrant jurisdiction over all claims that might be asserted against the defendant, but because they can thereby avoid resolving difficult questions presented by the minimum contacts test.

Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 634, 638-39 (1988). Professor Twitchell noted that courts were beginning to shift the rationale for exercising jurisdiction in such cases, invoking specific and not general jurisdiction "if a claim 'pertains to,' 'coincides with,' 'relates to,' or is 'connected with' a defendant's forum activities. Each of these formulations recognizes that claims having some connection with the forum have a stronger basis for jurisdiction than wholly unrelated claims; thus a court should take the nature of the claim into account in deciding whether jurisdiction is proper." *Id.* at 638-39. Professor Twitchell described the analysis that courts should perform in evaluating a defendant's due process objection to the exercise of specific jurisdiction:

> If the claim is more tenuously related to the defendant's purposeful forum activities, courts may require a higher threshold of contacts before finding jurisdiction, and perhaps take into account the availability of other forums and the impact of permitting jurisdiction on the substantive policies of competing forums. Under dispute-specific jurisdiction, the state

> need not determine whether it would permit jurisdiction over all claims asserted against the defendant in the forum, as it would under dispute-blind jurisdiction. In short, courts will continue to make what they now identify as 'general' jurisdiction decisions but in a manner that permits them to refine the principles of what they are, in fact, conducting – specific jurisdiction analysis.

*Id.* at 663-64. Professor Twitchell thus anticipated precisely the balancing approach taken by the California Supreme Court in this case.

BMS and its *amicus curiae* supporters complain that the approach taken by the California Supreme Court undermines predictability. *See, e.g.*, BMS Br. 29 (in the context of personal jurisdiction, "predictability is paramount."); Chamber Br. 20 (under California's approach to specific jurisdiction, "[a] potential defendant would be wholly unable to predict where litigation might be brought – which would harm the entire economy."). But as Part I of this brief demonstrates and as Professor Twitchell points out, courts have historically exercised personal jurisdiction over defendants who maintain substantial contacts that are merely related to the cause of action but are not "at home" in the forum state; they have simply called it general and not specific jurisdiction. *See* Twitchell, 101 Harv. L. Rev. at 664 ("[C]ourts will continue to make as what they now identify as 'general' jurisdiction decisions but in a manner that permits them to refine the principles

of what they are, in fact, conducting – specific jurisdiction analysis."). And because the California approach continues to require a showing that the defendant "purposefully avail[ed] itself of the privilege of conducting activities in the forum State," a potential defendant has "clear notice that it is subject to suit there." *Bristol-Myers Squibb v. Superior Court*, 377 P.3d 874, 886 (Cal. 2016) (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980)).

To be sure, the balancing required by the Due Process Clause "will lead to indeterminate results in some cases. Yet similar uncertainty is present in all constitutional doctrines attempting to protect individual rights under the American conception of justice." Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 Tul. L. Rev. 567, 643 (2007). The desire for predictability should not outweigh the need to allow the courts to engage in a comprehensive analysis in determining whether the exercise of personal jurisdiction in a particular case violates "traditional notions of fair play and substantial justice."

### B. Any Hardship to Defendants with Minimum Contacts in the Forum of Defending A Toxic Tort Claim Only "Related to" and not "Arising out of" Those Contacts Is Far Outweighed by the Unfairness and Inefficiency of Requiring the Claim to Be Litigated Piecemeal or in a State More Convenient to the Defendants.

BMS argues that its proximate cause requirement would prevent the exercise of personal jurisdiction by a state bearing "only an attenuated connection to the suit." BMS Br. 43. But the proximate cause test would often operate to prohibit a state with the *most significant connection* to the parties and the claim from exercising jurisdiction. For example, under BMS's jurisdictional test, the Due Process Clause would prevent a California court from adjudicating a claim brought by a California resident for harm done by BMS's Plavix if the resident filled the prescription across the state line in Nevada; it was BMS's activities in Nevada, not California, that proximately caused the injury.

Unfortunately, this type of outcome is no longer merely hypothetical or isolated. In *Erwin v. Ford Motor Co.*, No. 8:16-cv-01322-T-24 AEP (M.D. Fla. Aug. 31, 2016), a federal district court excused one of the "Big Three" automakers from answering a suit *based on an accident involving its automobile in the forum state.* The plaintiff in *Erwin* sued Ford in a federal court in

Florida alleging that his wife was killed in an automobile collision in Florida while driving a 2010 Ford Edge. *Id.* at *1. The plaintiff and his wife were residents of Ohio but spent three to four months each year in Florida for the thirteen years prior to the accident. *Id.* at *3. The Ford Edge involved in the accident was manufactured outside the state of Florida and purchased by the plaintiff's wife in Ohio, *id.* at *2, but Ford of course maintained extensive contacts in the state. *Id.* at *3. The district court concluded that because "Ford's contacts with Florida are not the 'but-for' cause of Decedent's injuries for which Plaintiff seeks relief, and Plaintiff's claims do not arise out of or relate to Ford's contacts with Florida," the court "lack[ed] specific jurisdiction over Ford pursuant to the Due Process Clause." *Id.* at *8. In support of its holding, the court cited the Alabama Supreme Court's lengthy per curiam opinion in *Hinrichs v. General Motors of Canada, Ltd.*, ___ So.2d ___, 2016 WL 3461177 (Ala. Jun. 24, 2016), which employed similar reasoning to find specific jurisdiction over a foreign manufacturer unavailable in a case brought in Alabama state court concerning a truck accident in Alabama. *Id.* at *7-*8.

The narrowing of the definition of general jurisdiction in *Daimler* without a corresponding relaxation of the concept of specific jurisdiction results in an overzealous application of "due process" which can have the effect of relegating litigation to profoundly unsuitable jurisdictions. The plaintiffs in *Erwin*, whose suit in Florida is based on an automobile accident in Florida to recover for injuries sustained there, must proceed

instead with their action either in Ohio (where they bought the car) or in the state of Ford's home. It is doubtful that this type of result was contemplated by any Justice sitting on the Court that decided *World-Wide Volkswagen*.[6]

The effect on plaintiffs in multi-party toxic tort litigation would be even more unfair and nonsensical. A resident of Texas who was exposed in Texas to the products of Defendant A, in Louisiana to the products of Defendant B, in Arkansas to the products of Defendant C, in Oklahoma to the products of Defendant D, and in New Mexico to the products of Defendant E could not sue all defendants in a single action in Texas, *even if they all conducted substantial and similar business there*. Instead, to seek full justice the plaintiff would be required to file a separate suit in each state in which the particular defendant engaged in activity that could be deemed a proximate cause of the plaintiff's injuries. Moreover, BMS's jurisdictional approach would multiply by *five* the number of judges and juries that would have to decide the claims arising out of this indivisible injury. Such an extravagant conception of

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[6] In holding that the Due Process Clause protected a retailer with no connection to the forum state from being haled into court there, the Court explained that if the entry of a product of a manufacturer or distributor into the forum state "is not an isolated occurrence" but arises from the efforts "to serve directly or indirectly" the market in that state, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner *or to others*." 444 U.S. at 297 (emphasis added); *see also id.* at 318 (Blackmun, J., dissenting) (noting that the exercise of jurisdiction over the manufacturer and importer "is not challenged before this Court.").

the defendant's due process rights comports with neither historical practice, fundamental fairness, nor judicial economy. The Court should reject BMS's proposed proximate cause requirement.

### C. The Concerns of BMS and the *Amici Curiae* Supporting It of Forum-Shopping Leading to Unjust and Unpredictable Results Are More Properly Addressed by Application of Traditional Procedural Protections Such as Choice-of-Law Limitations, Forum Non Conveniens, and Rules on Severance and Joinder.

Predictably, BMS's *amicus curiae* supporters urge the adoption of new restrictions on the exercise of personal jurisdiction to remedy what they consider to be the excesses of "out-of-state mass tort cases and their forum-shopping counsel." DRI Br. 4. Among other complaints, they assert that the specific jurisdiction analysis applied by the California Supreme Court infringes upon "important federalism interests by allowing a state to extend its authority into the dominion of sister states," U.S. Chamber Br. 25; that trial in an inconvenient forum often forces it into making a "disjointed and awkward" presentation in its defense, GSK Br. 23; and "the California judicial system is decidedly pro-plaintiff," DRI Br. 10.

Even if legitimate, these concerns should not be addressed by creating an inflexible rule of personal jurisdiction that will inevitably lead to unintended and

unfair consequences. Rather, the courts have other tools at their disposal to promote fairness and predictability in pharmaceutical, toxic tort, and mass tort litigation.

First, the concern that states might overstride their limits in regulating conduct occurring entirely in other states can be controlled "through means short of finding jurisdiction unconstitutional." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). "For example, the potential clash of the forum's law with the 'fundamental substantive social policies' of another State may be accommodated through application of the forum's choice of law rules." *Id.* (footnote omitted). Constitutional limitations on choice of law assure that the forum will apply the substantive law reasonably related to the cause of action. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) ("For a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.") (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)).

Second, courts may utilize the doctrine of forum non conveniens to direct litigation to a more appropriate forum. Unlike the doctrine of personal jurisdiction, which allows piecemeal dismissal of particular defendants from a case, forum non conveniens contemplates dismissal only of the entire case, allowing it to be brought in an adequate alternative forum. As one

scholar has observed, constitutional limitations on personal jurisdiction "should not be manipulated to pick and choose particular cases that the courts do or do not want to hear," but a court "may pick and choose the cases it wants to hear through a statutory or common-law doctrine such as forum non conveniens." Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for Forum Non Conveniens*, 71 Tex. L. Rev. 351, 400 (1992). *Amicus* GSK suggests that the doctrine of forum non conveniens "is not an adequate substitute for the due process protections embodied in this Court's personal jurisdiction jurisprudence" because a forum non conveniens determination is committed to the discretion of the trial court. GSK Br. 19 n. 9. But whether litigation in a particular forum would, as a practical matter, be inconvenient to the parties *should* be a matter to be left to the trial court's discretion, as the factors bearing on that determination vary from case to case and the trial court is better equipped to assess them. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 511 (1947). More important, appellate courts have not hesitated to rectify erroneous denials of forum non conveniens dismissal when that discretion has been abused. *See, e.g.*, *Amchem Prods., Inc. v. Rogers*, 912 So.2d 853 (Miss. 2005) (ordering claims nonresident plaintiffs severed and dismissed under the doctrine of forum non conveniens); *In re E.I. Du Pont de Nemours and Co.*, 92 S.W.3d 517 (Tex. 2002) (mandamus issued to order the dismissal of 8,000 asbestos cases involving out-of-state residents under the state's statutory doctrine of forum non conveniens); *cf. Hansen v. Owens-Corning Fiberglas Corp.*, 59 Cal. Rptr.

229 (Cal. Ct. App. 1996) (affirming order staying asbestos action based on California's doctrine). Application of the doctrine in appropriate cases is a better way to insure that trials are fair than the rigid jurisdictional rule BMS proposes.

Third, much of the concern expressed by the *amici curiae* focuses on not the place of trial but on the number of cases to be tried. *See, e.g.*, GSK Br. 7-8 ("In mass-tort suits around the country, plaintiffs' lawyers are recruiting a few in-state plaintiffs to use as anchors to bring large numbers of claims by out-of-state plaintiffs in the lawyers' preferred jurisdictions."); DRI Br. 11 (alleging that 25,000 pharmaceutical claims were filed in state courts in Los Angeles and San Francisco, 90% of which were on behalf of nonresidents of California). These cases will have to be heard *somewhere*. If claims of nonresidents are improperly "anchored" to those of California residents, they can be severed and dismissed under the doctrine of forum non conveniens. *David v. Medtronic, Inc.*, 188 Cal. Rptr.3d 103 (Cal. Ct. App. 2015) (affirming severance of claims of nonresident plaintiffs from claim of California resident and dismissal of claims of nonresident plaintiffs under the doctrine of forum non conveniens). There is no need to create a draconian, one-size-fits-all constitutional rule to protect defendants from forum-shopping and to promote the pursuit of litigation in an appropriate forum.

## CONCLUSION

The judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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ECORD
AND
BRIEF

No. 16-466

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner*,

*v.*

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
*Respondents.*

**On Writ of Certiorari to the California Supreme Court**

## BRIEF OF *AMICI CURIAE* ATLANTIC LEGAL FOUNDATION AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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March, 2017

## QUESTION PRESENTED

Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims – that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

The International Association of Defense Counsel is a non-profit professional association. It has no parent company and no shareholders.

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## INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the burdens on business, the judicial system, and the economy engendered by the need to defend claims in far distant venues, especially when those claims have little or no connection with the forum chosen by plaintiffs. Many of their employers (in the case of corporate general counsels) or clients (in the case of private practitioners) conduct business in states other than their state of incorporation and the state which is

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. The consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* nor their counsel made a monetary contribution to the preparation or submission of this brief.

their principal place of business (the forums in which they are subject to general personal jurisdiction, *see Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014)), and thus they have an interest in the rules governing specific personal jurisdiction over nonresident corporations.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost.

The abiding interest of *amici* in the proper limits of the exercise of jurisdiction by courts sitting in venues with non or only tangential connection to the events and contacts underlying the claim and the need to protect due process rights is exemplified by Atlantic Legal Foundation's participation as *amicus* or as counsel for *amici* in *Daimler AG v. Bauman*,134 S. Ct. 746 (2014). IADC, too, has previously weighed in on jurisdictional issues. See, e.g., *Novo Nordisk A/S v. Werner*, No. 13-214 (2013).

*Amici* believe that the decision of the California Supreme Court in this case is inconsistent with

this Court's precedents and with the due process rights of defendants.

## PRELIMINARY STATEMENT

This case involves 575 non-California residents (Respondents here) who brought suit in California State court alleging various California State law product liability claims against petitioner Bristol-Myers Squibb ("Bristol-Myers") based on Respondents' use of Plavix, a prescription drug manufactured by Bristol-Myers and approved by the Food and Drug Administration (FDA) for use in preventing blood clots. Pet. App. 1a, 147a; Pet. 5 & n.1. All of Respondents' claims were based on injuries alleged to have occurred outside California as a result of prescriptions written and filled outside California. Pet. App. 4a, 33a-34a. The plaintiffs in the product liability actions allege that consumers from across the nation suffered injuries after taking Plavix. Pet. App. 27a; see J.A. 42. [2]

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[2] The decision by plaintiffs' lawyers to file eight separate complaints, Pet. App. 2a, each with fewer than 100 plaintiffs, is an example of "forum shopping." Had any of the complaints included 100 or more plaintiffs, Bristol-Myers's would have had the right to remove that complaint to federal court under the Class Action Fairness Act (CAFA). See 28 U.S.C. § 1332(d)(11)(B)(I) (authorizing removal of a "mass action" in which the monetary claims of "100 or more persons are proposed to be tried jointly.".

The plaintiffs' bar considers juries in particular jurisdictions, California among them, to be sympathetic to plaintiffs. "[J]uries in California put a higher value on personal injury cases than the average American does." See, e.g. Ronald V. Miller, Jr., "Average Injury Verdicts in

(continued...)

The 575 nonresident plaintiffs claim no contacts with Bristol-Myers's activities in California or with California generally. Bristol-Myers is incorporated in Delaware, not California, and its principal place of business is New York. Pet. App. 4a; J.A. 82. Plavix is manufactured at a number of facilities, none of which is in California. Pet. App. 5a, 133a; J.A. 85. Sales of Plavix in California constitute only 1.1 percent of Bristol-Myers's total national sales revenue. Pet. App. 5a; J.A. 85.

The California Court of Appeal summarily denied Bristol-Myers's writ petition seeking review of the Superior Court's holding that it could exercise general jurisdiction over Bristol-Myers based on the company's substantial business activity in California. J.A. 9. Following the *Daimler* decision by this Court, the California Supreme Court directed the Court of Appeal to address the merits of Bristol-Myers's petition. J.A. 9-10. On remand, the California Court of Appeal concluded that although *Daimler* precluded assertion of *general* jurisdiction over Bristol-Myers with respect to the claims of the nonresident defendants, Pet. App. 100a-114a, California courts could still assert *specific* jurisdiction over Bristol-Myers. Pet. App. 114a-146a.

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[2](...continued)
California," Accident Injury Lawyer Blog (Dec. 15, 2010), *available at* http://www.accidentinjurylawyer blog.com/ 2010/12/average_injury_verdicts_in_cal.html.

A 4-3 majority of the California Supreme Court upheld the exercise of specific jurisdiction. Pet. App. 20a-44a.[3] The majority recognized that the Due Process Clause (U.S. Const. amend. XIV) bars California courts from exercising specific jurisdiction over Bristol-Myers unless Respondents can demonstrate that their claims "arise out of or are related to [Bristol-Myers's] forum-related activities." Pet. App. 20a-21a. While it did not assert that the claims of Respondents "arise out of" any of Bristol-Myers's California-based activities, the majority concluded that Bristol-Myers's activities were sufficiently "related to" those claims to warrant the exercise of personal jurisdiction. *Id.* at 25a-35a. The majority explained that, under California precedent, a "claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction"; it is enough that a claim bears a "substantial connection" to defendant's forum contacts. *Id.* at 25a, 27a (internal quotations omitted). The majority applied a "sliding scale" approach under which "the intensity of forum contacts and the connection of the claim to those contacts are inversely related." *Id.* at 32a (internal quotations omitted).

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[3]20a-44a The California Supreme Court unanimously held that, under *Daimler* and *Goodyear*, California courts could not exercise general jurisdiction over Bristol-Myers. Pet. App. 11a-19a, 44a; *id.* at 46a (dissent).

The majority held that, in order to satisfy the "related to" requirement, "the defendant's activities in the forum State need not be either the proximate cause or the 'but for' cause of the plaintiff's injuries." *Id.* at 22a. Instead, the majority held that it is sufficient to demonstrate "a substantial nexus or connection between the defendant's forum activities and the plaintiff's claims." *Id.* at 21a. It explained:

> The more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim. Thus, a claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Indeed, only when the operative facts of the controversy are not related to the defendant's contact with the State can it be said that the cause of action does not arise from that contact.

*Id.* at 22a (citations omitted).

The majority concluded that California courts could exercise specific jurisdiction over Bristol-Myers in cases involving Plavix that was prescribed, distributed, sold, ingested, and allegedly caused injuries to nonresidents outside California. The majority relied substantially on the fact that Bristol-Myers had sold "the same allegedly defective product" to other consumers [outside California] and had engaged in the same

nationwide "marketing and promotion" of Plavix. Pet. App. 28a. The court invoked the "sliding scale" to find that Bristol-Myers's "extensive contacts with California establish minimum contacts based on a less direct connection between [Bristol-Myers's] forum activities and plaintiffs' claims than might otherwise be required." Pet. App. 27a-34a. The majority acknowledged that Respondents were not injured by Plavix in California, were not prescribed Plavix by California doctors, did not have their prescriptions filled by California pharmacists and did not consume Plavix in California. It further acknowledged that Bristol-Myers neither developed nor manufactured Plavix in California, and that the distribution chain for the Plavix supplied to Respondents did traverse California. The majority based its "substantial connection" finding on evidence that Bristol-Myers (1) extensively marketed Plavix to California residents (but not to Respondents) in California as part of a nationwide marketing program; (2) contracted with a California corporation to distribute Plavix and hired several hundred salespersons within the State; and (3) maintains facilities in California that conduct research and development of *other* Bristol-Myers products (but not Plavix). Pet. App. 5a, 29a; J.A. 82.

The California Supreme Court thus held that California could exert personal jurisdiction over Bristol-Myers with respect to the claims not only of the 86 California residents (which Bristol-Myers

does not contest) but also with respect to the 575 nonresident plaintiffs.

Justice Werdegar, joined by Justices Chin and Corrigan, dissented. Pet. App. 46a-87a. They concluded: "*[T]he record contains no evidence connecting the Plavix taken by any of the nonresident plaintiffs to California.*" *Id.* at 47a (emphasis in original). The dissenters criticized the majority for "undermin[ing] [the] essential distinction between specific and general jurisdiction." *Id.* at 50a. They also pointed out that if the requisite connection between the forum and the litigation is established merely because a defendant has engaged in similar nationwide conduct, specific jurisdiction would expand "to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction." *Id.* They argued that the majority's conclusion that California could exercise jurisdiction over Bristol-Myers in connection with Respondents' claims was based on a specific-jurisdiction standard that conflicts with the standard adopted by this Court, *id.* at 51a-77a, and that the decision undermines the ability of businesses to predict the types of litigation to which they would be exposed when they decide to undertake activities within a State. *Id.* at 79a-80a.

## SUMMARY OF ARGUMENT

A state's exercise of jurisdiction comports with federal due process if the nonresident defendant has "minimum contacts" with the state and the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"

*Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

The "Due Process Clause . . . limit[s] the power of a State to assert *in personam* jurisdiction over a nonresident defendant." "Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984); see also *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (both quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

The "minimum contacts" calculus "focuses on the relationship among the defendant, the forum, and the litigation," *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (internal quotation marks omitted), and requires determining that the defendant "purposefully avail[ed]" itself of the forum. Burger King Corp., 471 U.S. 462, 472-476 (internal quotation marks omitted). "Arise out of or relate to" has meant that a defendant's activities in the State must be a cause of the plaintiff's claim. *Helicopteros*, 466 U.S. at 414 n.8.

When a cause of action does not arise out of a defendant's case-specific contacts with the forum State, a court may exercise "general jurisdiction" over a corporation if "the continuous corporate operations within a State are so substantial and of

such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Goodyear*, 564 U.S. 915, 919 (internal quotation marks and alterations omitted). If the defendant is a corporation, it is appropriate that a State in which the corporation can be fairly regarded as "at home," such as its "domicile, place of incorporation, and principal place of business," may exercise general personal jurisdiction. *Id.* at 2853-54. *Daimler* made it clear that a State may not exercise general jurisdiction over a corporation when the corporation is neither incorporated in nor has its principal place of business within the State, as in this case, even when the corporation has other contacts with the State. The court below understood that it could not exercise general jurisdiction over Bristol-Myers. The only basis, then, for exercising personal jurisdiction over Bristol-Myers in this case would be "specific jurisdiction."

"[W]hen a State exercises personal jurisdiction over a defendant in a suit in which plaintiff's claims "arise out of or relate to" the defendant's contacts with the forum State, the State is exercising 'specific jurisdiction' over the defendant." *Helicopteros*, 466 U.S. at 414 n.8. This Court's specific jurisdiction jurisprudence after *International Shoe* teaches that the existence or absence of a causal link between defendant's contacts with the State and plaintiff's claimed injury is essential in determining whether jurisdiction exists.

The California Supreme Court's analysis and holding on specific jurisdiction are fatally flawed. That court ignored the consistent teaching of this Court on the nature of contacts that can underpin the assertion of specific jurisdiction. The California court identified nothing Bristol-Myers did in the State that gave rise to the claims in their cases. And it is irrelevant that claims against another defendant and claims brought by other plaintiffs are subject to California jurisdiction. To establish specific jurisdiction, a plaintiff must identify acts connecting the defendant's actions *in California* with the plaintiff's claims.

Further, the California court's analysis is divorced from the realities of interstate commerce. That court's criteria for finding that California courts can exercise personal jurisdiction in cases such as this thwarts the expectations of out of State (and foreign) companies that serve markets in the United States, especially in sectors that are complex, require massive investment and thus depend on nationwide and world-wide markets, draw on talent located in numerous States and countries, and require national or supranational regulatory approvals of several jurisdictions,.

The decision below deprives businesses of adequate means to structure their conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

## ARGUMENT

### I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S SPECIFIC JURISDICTION DECISIONS

Over the last seventy years, this Court has identified and described the due process requirements for the exercise of personal jurisdiction. A court may exercise *in personam* jurisdiction only if the defendant has "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted). The minimum-contacts requirement ensures that a defendant has "fair warning" that a decision to engage in particular activities may subject it to the jurisdiction of a foreign sovereign. *Burger King*, 471 U.S. 462, 472 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The nature of forum contacts that provide such fair warning hinges on whether a court is exercising "general" or "specific" jurisdiction. See *Burger King*, at 472-73 & n.15; *Daimler*, 134 S. Ct. 746, 757 (2014) (referring to "'the essential difference between case-specific and all-purpose (general) jurisdiction'") (quoting *Goodyear*, 564 U.S. 915, 927 (2011)).

General jurisdiction is established when a defendant's contacts "are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear*, 564 U.S. 919-920

(citation omitted). "For an individual [defendant], the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation *is fairly regarded as at home*" (such as the State of incorporation or principal place of business). *Goodyear*, 564 U.S. at 924 (emphasis added).

Specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation," *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (internal quotation marks omitted).

The Court's personal jurisdiction jurisprudence can be distilled to several principles. *First*, due process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King*, 471 U.S. 462, 471-472 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). A court may subject a person to jurisdiction only when that person has sufficient contacts with the State "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316; see also *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (plurality opinion). The "minimum contacts" requirement serves important functions in our federal system: it protects the defendant from being required to defend a lawsuit in an inconvenient forum and it "acts to ensure that the States through their courts, do not reach out beyond the limits imposed

on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. It also "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King*, 471 U.S. 462, 472 (1985).

*Second*, the Due Process Clause prohibits a court from exercising personal jurisdiction unless the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. 286, 297 (1980). "[E]xorbitant" exercises of personal jurisdiction "are barred by due process constraints on the assertion of adjudicatory authority." *Daimler*, 134 S. Ct. at 751.

*Third*, the requirement of minimum contacts ensures that the defendant has "fair warning" that its decision to engage in certain activities may subject it to a foreign court's jurisdiction and "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King*, 471 U.S. 462, 472 (1985). In *Daimler* this Court recently acknowledged that predictability is an important aspect of due process, noting that even corporations with nationwide sales are entitled to some "minimum assurance[s]" about where their conduct will render them liable to suit. *Daimler*,

134 S. Ct. at 760-62; *see also Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Predictability is valuable to corporations making business and investment decisions.")

*Fourth*, a State's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958). "[I]t is the defendant's purposeful availment that makes jurisdiction consistent with 'traditional notions of "fair play and substantial justice."' *J. McIntyre Mach.*, 564 U.S. 873, 880, 131 S.Ct. 2780, 2783 (2011).

The Court has consistently held that a State court may not exercise personal jurisdiction over an out-of-State defendant merely because the defendant has engaged in continuous and systematic activities within the State; the assertion of personal jurisdiction also requires a showing that the defendant's activities are sufficiently connected to the claim. *See, e.g., Daimler*, 134 S. Ct. at 757 ("a corporation's 'continuous activity of some sort within a State is not enough to support the demand that the corporation be amenable to suits unrelated to that activity'") (quoting *International Shoe*, 326 U.S. at 318). Since *International Shoe*, this Court has made it clear that "specific or case-linked" jurisdiction requires a causal connection between the defendant's forum conduct and the litigation. *Goodyear*, 564 U.S. 915, 919. In other words, personal jurisdiction may not be exercised over

nonresident defendants based on claims "having nothing to do with anything that occurred or had its principal impact in" the forum State. *Daimler*, 134 S. Ct. at 762.

Cases involving specific jurisdiction require a lesser showing of forum contacts by the defendant but still allow a court to assert jurisdiction only if the plaintiff's claims "arise out of or relate to" those contacts. *Helicopteros*, 466 U.S. 408, 414 & nn.8-9 (1984).[4]

Thus, for the California courts to exercise personal jurisdiction over Bristol-Myers with respect to the claims asserted by Respondents, they must satisfy the requirements of "specific jurisdiction" – that is, that the claim "arises out of or relates to the defendant's contacts with the forum." *Daimler*, 134 S. Ct. at 754.

### A. Respondents' Claims Do Not "Arise Out Of" Or "Relate To" Bristol-Myers's Contacts with California.

Specific jurisdiction gives a State authority to adjudicate disputes "arising out of or relating to the defendant's contacts with the forum." *Daimler*, 134 S. Ct. at 754 (quoting *Helicopteros*,, 466 U.S.

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[4] We will not dwell on general jurisdiction nor on the differences between general and specific jurisdiction because as noted above it is undisputed that Bristol-Myers is neither incorporated in California, nor does it maintain its principal place of business in the State, (see *Daimler*, 134 S. Ct. at 760), Pet. App. 4a; J.A. 82, and both the majority and the dissent agreed that Bristol-Myers was not subject to general jurisdiction in California. Pet. App. 9a-19a, 46a.

408, 414 n.8); see also *International Shoe*, 376 U.S. at 319. We submit that the phrases "arising out of" and "relate to" incorporate the notion of a causal relation between the defendant's in-State acts and plaintiff's alleged injury, and that specific jurisdiction exists only when the defendant's contacts with the forum caused the plaintiff's alleged injuries and the resulting claim. There is no such causal relationship between Bristol-Myers's acts in California and Respondents' ingestion of (and alleged injury from) Plavix in the more than 30 other States in which those plaintiffs reside, and bought and used Plavix.

In deciding that Respondents' claims in this case "arise out of or relate to" Bristol-Myers's contacts with California, the California Supreme Court principally relied on evidence that Bristol-Myers markets Plavix nationally and that its California marketing efforts are similar to its marketing efforts in the non-California plaintiffs' home States. Pet. App. 28a.[5] The court concluded that Respondents' claims "are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product [as asserted by other, California-based plaintiffs], which allegedly caused injuries in and outside the State. Thus, the nonresident plaintiffs' claims bear a substantial connection with Bristol-Myers's contacts in California." *Ibid.*

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[5] There was no evidence, or even an allegation, that any of the non-California plaintiffs saw Plavix ads that were published in California.

The California Supreme Court also cited the fact that "Bristol-Myers maintains research and laboratory facilities in California, and it presumably enjoys the protection of our laws related to those activities," Pet. App. 29a. The California Supreme Court's majority conceded that none of those facilities ever conducted any research related to Plavix, yet it concluded that the existence of those facilities "provides an additional connection between the nonresident plaintiffs' claims and the company's activities in California." *Ibid.* The Court justified that "substantial nexus and connection" finding on the fact that the complaint includes claims that *other* Bristol-Myers research facilities located in *other* States were responsible for the allegedly negligent development and design of Plavix.[6] That justification, which is based on nothing more than a belief that a very general similarity of function (scientific research) between Bristol-Myers's California research facilities and its research facilities elsewhere somehow connects Bristol-Myers's alleged tortious conduct in this case with respect to a particular product to California illustrates the amorphous, all-encompassing, and essentially boundless scope of the California court's assertion of personal jurisdiction over nonresident companies that

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[6] The California court's use of the phrase "and [Bristol-Myers] presumably enjoys the protection of our laws related to those activities..." is a clue that the state court was eliding the concepts of general and specific jurisdiction.

conduct *any* business within the State. As far as the California Supreme Court is concerned, the requisite minimum contacts among Bristol-Myers, the forum, and the litigation can be established even when, as here, "the nonresident plaintiffs' claims would be exactly the same if Bristol-Myers had no contact whatever with California." *Id.* at 29a. That can fairly be described as the "kitchen sink" rule of personal jurisdiction.

The California Supreme Court's conclusion that causation could be dispensed with so long as the defendant's contacts are sufficiently "wide ranging" is wrong and impermissibly blurs the distinction, heretofore quite clear, between specific jurisdiction and general jurisdiction. The so-called "sliding scale approach" lacks any basis in this Court's precedents. Indeed, it is inconsistent with *International Shoe*, the foundational precedent; in that case the Court held that isolated in-State activities do not permit jurisdiction of "causes of action unconnected with the activities there." *International Shoe*, 326 U.S. at 317.

In *Helicopteros*, 466 U.S. 408 (1984), the Court determined that the defendant's numerous contacts with Texas were insufficient to permit that State to exercise personal jurisdiction because those contacts did not arise out of or relate to the plaintiffs' claims which involved injuries arising from a helicopter crash in Peru.

*Burger King* took the same causal approach in assessing the link between the litigation and the forum. Much like in *International Shoe*, the Court said that specific jurisdiction is proper where "the

litigation results from alleged injuries that 'arise out of or relate to' th[e] [defendant's] activities" in the forum State. *Burger King*, 471 U.S. at 472 (internal quotation marks omitted). That connection exists, the Court explained, where the litigation seeks to hold a defendant "to account * * * for consequences that arise *proximately* from such activities." *Id.* at 474 (emphasis added). Thus, a franchisee could be sued in Florida for a "franchise dispute [that] grew *directly* out of" a contract negotiated and performed in Florida and that "*caused foreseeable* injuries" in the State. *Id.* at 479-480 (emphases added).[7]

In *Walden v. Fiore*, the Court held that the plaintiff could not bring a tort suit in Nevada because it was "undisputed that no part of [the defendant's] course of conduct occurred in Nevada" and the plaintiffs had not been injured "because [of] anything" the defendant did there. 134 S. Ct. at 1124-1125 (emphases added). This Court

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[7] As Justice Werdegar explained in dissent:

> Of the post-*International Shoe* decisions in which the high court actually found a factual basis for specific jurisdiction, each featured a direct link between forum activities and the litigation. (See *Burger King Corp. v. Rudzewicz*, (1985) 471 U.S. 462, 479-80 [specific jurisdiction in Florida courts proper where franchise dispute "grew directly out of" contract formed between a Florida franchisor and Michigan franchisee, whose breach caused "caused foreseeable injuries to the corporation in Florida."]).

Pet. App. 53a-54a.

emphasized that the specific jurisdiction inquiry "focuses on the relationship among the defendant, the forum, and the litigation" and held that "[f]or a State to exercise jurisdiction consistent with due process, *the defendant's suit-related conduct must create a substantial connection with the forum State.*" 134 S. Ct. at 1121 (emphasis added; internal quotation marks omitted). This Court held that a Nevada court lacked specific jurisdiction over claims against a DEA agent arising from the seizure of a Nevada plaintiff's cash at the Atlanta airport. The Court agreed that the injury allegedly caused by defendant's conduct occurred in Nevada because plaintiff resided there and that the defendant was aware of the plaintiff's residence. *Id.* at 1125. The Court nevertheless concluded that those facts were insufficient to establish that the plaintiff's claims "arose out of or were related to" *defendant's* Nevada contacts. It explained that "[f]or a State to exercise jurisdiction consistent with due process," it is the defendant's "suit-related conduct" that must create a "substantial connection" with the forum State, *id.* at 1121, and that plaintiff's residence was unrelated to the defendant's actions in Atlanta. Due process prohibited a Nevada court from exercising personal jurisdiction. The decision below, which based specific jurisdiction on Bristol-Myers's California contacts that were not "suit related," is inconsistent with *Walden*. See also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) (specific jurisdiction is warranted "when

the cause of action arises out of the very activity being conducted, in part, in [the forum State]")

This Court has repeatedly rejected assertions of jurisdiction because the claims at issue did not "arise[] out of an act done or transaction consummated in the forum State," *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); or "ar[o]s[e] from [an act] that occurred" elsewhere, *Kulko v. Superior Court*, 436 U.S. 84, 97 (1978); or did not "stem from a constitutionally cognizable contact with" the forum, *World-Wide Volkswagen*, 444 U.S. 286, 299. We have found no case in which the Court found specific jurisdiction in the absence of a causal relationship between the defendant's forum contacts and the plaintiff's claim.

### B. The California Supreme Court's Expansive Concept of Specific Jurisdiction Ignores This Court's Admonition That Jurisdiction Rules Should Promote Predictability.

The Due Process Clause entitles potential defendants to "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Burger King*, 471 U.S. at 472 (internal quotation marks omitted) and thus to "predictability" about when they can be hailed into court, *World-Wide Volkswagen*, 444 U.S. at 297, in a place where they are not "at home," *Goodyear*, 564 U.S. at 924.

This enables businesses and individuals to "structure their conduct with some guidance as to what conduct will and will not render them liable to suit," and to take actions to "alleviate the risk of

burdensome litigation" – including by "procuring insurance, passing the expected costs on to customers," and, if necessary, "severing [their] connection with [a] State" altogether. *World-Wide Volkswagen*, 444 U.S. at 297.

Simplicity, clarity and predictability are related. The Court explained in *Daimler* that it adopted its rule governing general jurisdiction over corporations in part because ascertaining a corporation's principal place of business and its place of incorporation – the criteria that *Daimler* held are determinative of where a corporation is "at home" and thus amenable to general jurisdiction – is a relatively straightforward exercise: "These bases afford plaintiffs at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Daimler*, 134 S. Ct. at 760. See *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (the Court has a preference for "[s]imple jurisdictional rules" that "promote greater predictability").

The California court's "substantial nexus or connection test" is anything but simple, clear and unambiguous. It establishes a "sliding scale" – a showing that the defendant has numerous forum contacts (regardless of whether they are related to the case at bar). While it reduces the required showing of connection between those contacts and the plaintiffs' claim, Pet. App. 22a, the degree of reduction is not specified, and presumably will be determined on a case-by-case basis. *Id.* at 35.

*Goodyear*, at least implicitly, rejected that approach. In *Goodyear*, the Court held that the

litigation lacked a sufficient link to North Carolina "[b]ecause the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad." 564 U.S. at 919 (emphasis added). In that case several individuals sued a foreign company in North Carolina after allegedly defective tires caused a bus accident in France. 564 U.S. at 918. The North Carolina Court of Appeals purported to exercise general jurisdiction over the defendant because the defendant also sold tires into North Carolina through "the stream of commerce." *Id.* at 919-920.

This Court unanimously reversed. The North Carolina court's stream-of-commerce analysis, it held, "elided the essential difference between case-specific and all-purpose (general) jurisdiction." *Id.* at 927. "Flow of a manufacturer's products into the forum * * * may bolster an affiliation germane to *specific* jurisdiction," *id.*, but unless the defendant's forum activity is so continuous and systematic as to render the company "at home," *id.* at 929, it is "not enough to support the demand that the corporation be amenable to suits unrelated to that activity," *id.* at 927 (emphasis added) (internal quotation marks omitted). By "[c]onfusing or blending general and specific jurisdictional inquiries," the Court held, North Carolina had offered an "inadequate basis for the exercise" of jurisdiction. *Id.* at 919-920.

The decision below departs from that clear principle and thus effectively circumvents long-settled limits on "stream of commerce"

jurisdiction. In so doing, it creates greater uncertainty for product manufacturers.[8] Under the California Supreme Court's approach the decision to forbear manufacturing or selling a product in a State affords little protection if the defendant has substantial other, unrelated, business activities there.

The court below concluded that California courts can exercise specific jurisdiction over Respondents' claims based on a somewhat random combination of disparate California contacts. The California court did not assign a rank or weight to each of those contacts, or explain whether any one of them, by itself, might be sufficient to establish personal jurisdiction.

In contrast, the reasoning in *Goodyear* provides a straightforward rule for specific jurisdiction in product liability and tort cases: If the allegedly defective product was not manufactured or sold in the forum State and the plaintiff was not injured in the forum State, there is no specific jurisdiction in the forum. That clear rule provides significant predictability. If a manufacturer knows that it will be subject to specific jurisdiction in cases involving a particular product only in a State where it has

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[8] A California court presiding over cases such as these would be in the position of applying the laws of more than 30 other States in which the out-of-State plaintiffs reside, purchased the product, or were allegedly injured, under usual choice of law rules, even though State courts frequently lack experience in applying the law of other States.

manufactured or sold that product, and only for the particular product actually manufactured, sold, or which caused injury in that State, it can make an informed decision about whether and to what extent it wishes to manufacture in or sell in the State. Such a rule aligns economic interests with judicial doctrine.

In contrast, the California court's "sliding scale" approach, like the North Carolina court's reasoning in *Goodyear*, confuses the concepts of, and criteria for, general and specific jurisdiction. The sliding scale test purports to determine whether a defendant is subject to specific jurisdiction on a plaintiff's claim by weighing "the intensity of [defendant's] forum contacts" (a consideration relevant to general jurisdiction) against "the connection of the claim to those contacts" (a consideration relevant to specific jurisdiction). Pet. App. 22a.

As the dissent below pointed out, the majority's approach "undermines" the "essential distinction between specific and general jurisdiction" as articulated in both *Daimler* and *Goodyear* and "expands specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction,"and "creates the equivalent of general jurisdiction in California courts." Pet. App. 50a-51a.

The sliding scale approach results in a manufacturer such as Bristol-Myers being subject to specific jurisdiction in California on all defect claims for any of its products sold nationwide. The court below wrote that Bristol-Myers "embraced

th[e] risk" of being sued in California by nonresident plaintiffs when it decided to include California within its nationwide Plavix sales efforts. Pet. App. 33a. It did not, however, explain why Bristol-Myers assumed a risk of suit in California by advertising Plavix to patients in Texas, New York, or Illinois. Moreover, it is unrealistic for manufacturers to exclude a market as large as California from their marketing efforts, nor would it serve the interests of Californians to be denied the benefit of pharmaceuticals, or other useful products, because a producer of such goods fears being subject to suit in California on claims by residents of other States or countries. The California court would, essentially, require a company to choose between access to a large market and the risks of virtually unlimited exposure to suit.

If, as the California court believes, plaintiffs can bring claims in any State as long as they allege a "common nationwide course of distribution," Pet. App. 28a, a business's ability to predict where it is subject to suit, and its ability to tailor its conduct to limit exposure to litigation, or to obtain insurance to cover the risk, would be drastically reduced, because a "company's potential liabilities [could not] be forecast from its [in-]State activities." *Id.* at 83a (Werdegar, J., dissenting).

An out-of-State corporation has little guidance regarding what activities in California will subject them to the jurisdiction of California courts for claims arising outside the State. That result is

inconsistent with *Daimler*'s (and the Due Process Clause's) goal of predictability.

As the *Daimler* Court discerned in rejecting the Ninth Circuit's expansive concept of personal jurisdiction over nonresident defendants based on claims arising outside the forum, "exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-State defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King*, 471 U.S. 462, 472 (1985)).

If this Court does not reverse the decision below, other jurisdictions are likely to adopt a similar wide-ranging definition of "specific jurisdiction." Any plaintiff who purchased the product anywhere could bring suit in any State where the product was sold, simply by alleging that the manufacturer engaged in a "common nationwide course of distribution." Manufacturers effectively would be subject to general jurisdiction in every State in which they sell their products. Such an approach allows a State court to vary the scope of the relatedness requirement according to the quantity and subjective "quality" of the defendant's forum contacts, the result being a "totality of circumstances" test that completely undermines predictability.

## CONCLUSION

This Court should reverse the judgment of the California Supreme Court.

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March 2017

No. 16-466

# In The Supreme Court of the United States

Bristol-Myers Squibb Co., Petitioner
v.
Superior Court of California for the County of San Francisco, et al., Respondents

**On Writ of Certiorari to the California Supreme Court**

## BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS


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# BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

## INTEREST OF THE *AMICUS CURIAE*[1]

This brief is submitted on behalf of the Attorneys Information Exchange Group (AIEG). AIEG represents the safety interests of consumers who, unfortunately, are the victims of unsafe motor vehicles that precipitate crashes or needlessly cause injury across the United States. Headquartered in Birmingham, Alabama, AIEG is an organization of over 800 attorneys who practice civil litigation throughout the United States. AIEG was founded in the mid-1970s by attorneys representing burn victims whose vehicles had burst into flames in the wake of collisions. In founding this organization, AIEG's pioneer members have dedicated themselves to the creation of a private cooperative entity that serves both to educate Americans who have suffered catastrophic injury as a result of defectively designed motor vehicles and to coordinate the legitimate acquisition of technical information germane to these citizens' fair and honest legal representation. Over the years, AIEG members have represented the victims of such infamous products as defective Takata airbags and GM cars equipped with faulty ignition switches, the Ford Pinto, GM cars and pick-up

[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than amicus has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

trucks with defectively designed fuel systems (e.g., side saddle fuel tanks), Audi and Toyota vehicles prone to uncontrollable acceleration, and thousands of Ford Explorers with defective Firestone tires that have disintegrated, injuring or killing untold numbers of Americans.

## STATEMENT

This case presents the Court with an opportunity to clarify the standards for exercising specific personal jurisdiction in a product case. It might not be apparent that the law would need this Court's clarification in light of the fact that the standards do not appear to have changed in the 38 years since this Court decided *World–Wide Volkswagen v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980). However, the standards for ***general*** jurisdiction were significantly altered in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 564 U.S. 915 (2011). In the ensuing uncertainty from such a dramatic narrowing in the bases for ***general*** jurisdiction, some have inferred that the Court must have also intended to similarly narrow ***specific*** personal jurisdiction. This case presents an excellent chance either to confirm that there has been no seismic shift in the standards for exercising specific personal jurisdiction or to clarify what change the Court intended.

This case also presents an opportunity to clarify the ongoing role of stream-of-commerce analysis in the assessment of specific personal jurisdiction in product cases. In product cases, stream-of-commerce analysis subsumes any discussion of the "relatedness" of the defendant's contacts with the forum because the placement

of the product into the stream of commerce with the intention of directly or indirectly serving the forum is the minimum contact which serves as the predicate for proceeding on to the fairness analysis.

Finally, this case presents the Court with an opportunity to address some of the fairness and practicality issues arising from modern nationwide and global commerce which Justice Breyer found to be factually underdeveloped in the record from *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 131 S. Ct. 2780 (2011). The Court should seize upon the opportunity to elucidate how the Due Process and fairness concerns apply differently in the context of a mult national drug company as contrasted with how those same standards might apply differently to a small Appalachian potter or Kenyan coffee farmer.

## SUMMARY OF THE ARGUMENT

This Court recently confirmed a simple two-step process for assessing specific personal jurisdiction:

> First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case.

*Daimler AG v. Bauman*, 134 S. Ct. 746, 762 (2014). Bristol-Myers Squibb invites this Court to needlessly clutter that simple process. Instead, the Court should reconfirm this two-step process.

Some cases outside of the product liability context debate the degree to which a defendant's tortious acts at the heart of the civil action must connect with the forum. This debate is misplaced when transplanted into a product case because a product defendant's specific-jurisdiction-conferring contact with the forum is most typically through its product:

> The stream-of-commerce cases ... relate to exercises of specific jurisdiction in products liability actions, in which a nonresident defendant, acting outside the forum, places in the stream of commerce a product that ultimately causes harm inside the forum.... Flow of a manufacturer's products into the forum may bolster an affiliation germane to ***specific*** jurisdiction, *see, e.g., World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490....

*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2849 (2011). For four decades, this Court has uniformly held that the contacts with a forum are sufficient to reach the second-step fairness determination of specific personal jurisdiction in product cases when the anticipated flow of a manufacturer's product into the forum through the stream of commerce is purposeful and not an isolated occurrence. Bristol-Myers Squibb's efforts to graft a conduct-focused analysis from non-product jurisdiction cases into the specific personal jurisdiction standard for product cases makes little sense because product liability focuses on the product and not the defendant's conduct.

In the case at bar, the claims against Bristol-Myers Squibb and McKesson Corp. (the California-based co-defendant Bristol-Myers Squibb contracted with to distribute Plavix in California and other states) involve the product Plavix, which Bristol-Myers Squibb placed into the stream of commerce with the intent of serving and profiting from the California market (over an eighth of the claimants suffered their harms from Plavix in California), and also involve Plavix marketing associated with Bristol-Myers Squibb's California-based sales representatives. This connection between the California forum and the claims in suit is a sufficient basis at least to reach an assessment of the fairness factors which are part of the separate second step in the process. If Bristol-Myers Squibb believes the California courts' aggregation of the non-California residents' claims with the California residents' identical claims violates its Due Process rights, that argument should be addressed under *Daimler AG*'s second step, which is devoted to such fairness considerations. Instead, Bristol-Myers Squibb wants to frontload its fairness arguments into the first step which focuses, instead, on the narrower question whether the connection between the forum and the claims in suit could justify the exercise of specific jurisdiction. This is a ploy to improperly limit the scope of contacts properly considered when assessing the fairness of exercising jurisdiction.

Finally, Bristol-Myers Squibb requests this Court to adopt a new standard applicable to all future specific jurisdiction cases, and – yet – Bristol-Myers Squibb does not address the implications of its novel standard for other cases. Under Bristol-Myers Squibb's proposed new standard, how would the claimants in the Ford-Firestone debacle have fared? In cases from Florida to Alaska and

Maine to Hawaii, Ford would have claimed it neither designed nor manufactured the Explorer in the forum and so it is subject to suit in Michigan instead of the forum where the crash occurred. Firestone would have offered similar arguments about the design and manufacture of the tire and would have insisted it was susceptible to suit in Tennessee instead of the forum. This would erase four decades of stream-of-commerce jurisprudence and take us back toward *Pennoyer*'s outdated territorial analysis.

Allowing global manufacturers to retreat from specific jurisdiction in forums where they profited from voluminous product sales would have grave consequences: in most states, when the manufacturer escapes the courts' jurisdiction, the local retail seller is left to answer for the defects in the product. Such an inefficient return to *Pennoyer*'s territorial focus is not what this Court intended:

> Since *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Goodyear*, 564 U.S., at ——, 131 S.Ct., at 2854 (quoting Twitchell, The Myth of General Jurisdiction, 101 Harv. L.Rev. 610, 628 (1988)). *International Shoe*'s momentous departure from *Pennoyer*'s rigidly territorial focus, we have noted, unleashed a rapid expansion of tribunals' ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum.

*Daimler AG*, 134 S. Ct. at 755. Contrary to this Court's analysis of the "rapid expansion" of specific personal jurisdiction in *Daimler AG*, Bristol-Myers Squibb interprets the same precedents as presaging an historic restriction back toward *Pennoyer* 's rigidly territorial focus. This would be a jurisprudential mistake.

## ARGUMENT

### I. THIS COURT SHOULD CLARIFY THAT THE TWO-STEP PROCESS FOR ASSESSING SPECIFIC PERSONAL JURISDICTION ADDRESSED IN *DAIMLER AG* CANNOT BE DISREGARDED.

Bristol-Myers Squibb asks this Court to clarify the process for assessing specific personal jurisdiction, and yet Bristol-Myers Squibb's petition assiduously ignores this Court's recent clarification of how to assess specific personal jurisdiction. Just three years ago, this Court confirmed a two-step process where the first step is to identify whether there is a connection between "the forum and the episode-in-suit" and then the second separate step is to assess the fairness concerns:

> First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case.

*Daimler AG v. Bauman*, 134 S. Ct. 746, 762 (2014). The

Court further noted that such specific jurisdiction "to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum" is "rapidly expanding" (not shrinking as Bristol-Myers Squibb argues):

> *International Shoe*'s momentous departure from *Pennoyer*'s rigidly territorial focus, we have noted, unleashed a rapid expansion of tribunals' ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum. Our subsequent decisions have continued to bear out the prediction that "specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene."

*Id.*, 134 S. Ct. at 755. The California court followed this two-step analysis, and yet Bristol-Myers Squibb's arguments make every effort to blur the distinction between these two separate steps.

### A. The first step considers the connection between the forum and the episode-in-suit.

As the beginning of the two-step analysis to assess specific jurisdiction, "[f]irst, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction." *Id.*, 134 S. Ct. at 762. The Supreme Court of California complied with this requirement.

For example, the California court began its analysis by noting that, for 86 claimants, the disputed Plavix was prescribed, administered, and caused harm in the California forum. *See Bristol-Myers Squibb Co. v. Superior Court*, 1 Cal. 5th 783, 788, 377 P.3d 874, 877 (2016), *cert. granted sub nom. Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 827 (2017). This is jurisdictionally significant. "Flow of a manufacturer's products into the forum may bolster an affiliation germane to ***specific*** jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S. Ct. 2846, 2849 (2011) (citing *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559 (1980)). Bristol-Myers Squibb attempts to downplay the jurisdictional significance of the fact that its product flows into the forum where it harmed claimants by conceding that it cannot win its argument against these California claimants. By attempting to limit its challenge to the California forum's jurisdiction to hear the non-Californians' claims, however, Bristol-Myers Squibb has essentially limited its challenge to contesting the courts' powers to consolidate related claims, and this is an argument that falls under *Daimler AG*'s second step (concerning Due Process and fairness), not the first step (whether the connection between the forum and the episode-in-suit could justify jurisdiction).

Next, the California Supreme Court noted that Bristol-Myers Squibb "does not contest that its marketing, promotion, and distribution of Plavix was nationwide and was associated with California-based sales representatives." *Bristol-Myers Squibb*, 1 Cal. 5th at 803, 377 P.3d at 888. This is also jurisdictionally significant because the California claimants and non-California

claimants both assert that Bristol-Myers Squibb negligently and falsely promoted Plavix through a marketing plan associated with Bristol-Myers Squibb's California-based sales force. *Id.*, 1 Cal. 5th at 789, 377 P.3d at 878. As a result, the California-resident and non-California-resident plaintiffs' claims bear this connection to the California forum.

Finally, the Supreme Court of California noted that Bristol-Myers Squibb's contracted with its co-defendant, McKesson Corp., a California resident headquartered in San Francisco. *Id.*, 1 Cal. 5th at 798, 377 P.3d at 884. Those claims for which California plaintiffs and non-California plaintiffs both assert joint liability between Bristol-Myers Squibb and McKesson Corp. will be litigated against McKesson Corp. regardless of whether Bristol-Myers Squibb is present to defend only those claims of the California plaintiffs or present to defend all plaintiffs' claims brought jointly against Bristol-Myers Squibb and McKesson Corp. *Id.*, 1 Cal. 5th at 811, 377 P.3d at 893. This raises indemnification issues under the California contract. *Id.*

While these connections between the claims in suit and the forum are not enough by themselves to fully resolve the issue of specific personal jurisdiction without further consideration of the fairness factors, these forum contacts are sufficient to move onward to the second step in the jurisdictional analysis.

### B. The separate second step considers those Due Process and fundamental fairness factors traditionally weighed to assess the reasonableness of entertaining the case.

Once a court has determined that the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction, "[t]hen, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case." *Daimler AG*, 134 S. Ct. at 762. The California court also complied with this second-step requirement. *See Bristol-Myers Squibb*, 1 Cal. 5th at 808-13, 377 P.3d at 891-94.

Thirty-eight years ago, this Court listed additional factors to be considered when weighing the fairness of exercising specific personal jurisdiction, including (1) the burden on the defendant, (2) the forum State's interest, (3) the plaintiff's interest in effective relief, (4) the interstate judicial system's interest in efficiency, and (5) the interest of the several States in furthering social policies:

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko v. California Superior Court, supra*, 436 U.S., at 92, 98 S.Ct., at 1697, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. *Shaffer v. Heitner*, 433 U.S. 186, 211, n. 37, 97 S.Ct. 2569, 2583, n. 37, 53 L.Ed.2d 683

> (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see *Kulko v. California Superior Court, supra,* 436 U.S., at 93, 98, 98 S.Ct., at 1697, 1700.

*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 564–65 (1980).

The California court noted that Bristol-Myers Squibb will be litigating claims of the 86 California plaintiffs in the forum and, consequently, litigating the remaining 592 non-California plaintiffs' identical claims in the same forum would be ***less*** of a burden on Bristol-Myers Squibb than litigating "the claims of these other 592 nonresident plaintiffs in a scattershot manner in various other forums, in potentially up to 34 different states." *Bristol-Myers Squibb*, 1 Cal. 5th at 809, 377 P.3d at 891.

With regard to the forum's interests, the California Supreme Court held that California has an interest in litigating the dispute because Bristol-Myers Squibb's co-defendant is Plavix-distributor McKesson Corp., a California resident. *Id.*, 1 Cal. 5th at 811, 377 P.3d at 893. Regardless of the resolution of Bristol-Myers Squibb's jurisdictional challenge, the claims of California and non-California residents will go forward against McKesson Corp., which has joint liability with Bristol-Myers Squibb and a "corresponding right to indemnification" from Bristol-Myers Squibb. *Id.* The Supreme Court of California also noted California's interest in regulating the conduct of Bristol-Myers Squibb's 250 sales

representatives in California. *Id.*, 1 Cal. 5th at 810, 377 P.3d at 892.

Next, the California court addressed how the California forum furthered the plaintiffs' interests in a convenient and effective forum. *Id.*, 1 Cal. 5th at 811, 377 P.3d at 893.

Finally, the California court addressed how the interests of judicial economy and the related shared goals of the interstate judicial system were furthered by California's exercise of jurisdiction. *Id.*, 1 Cal. 5th at 811–13, 377 P.3d at 893–94. Specifically, the court noted how consolidating both the California and the non-California claimants into a single action is the most efficient course of action. *Id.*

### C. Bristol-Myers Squibb seeks to blur the distinction between these two separate steps by cloaking the first step in the garments of the fundamental fairness factors when those considerations have traditionally been part of the second step.

Although the fairness analysis occurs in the second step under *Daimler AG*, Bristol-Myers Squibb cannot prevail on this second step and so Bristol-Myers Squibb attempts to cloud the distinction between the first step (regarding the contact between the issue in suit and the forum) and the second step (regarding fairness). This sleight of hand was called out by the California Supreme Court:

> BMS does not argue that the assertion of jurisdiction in this case would be fundamentally unfair, but does advance several arguments it contends defeat the claim that their causes of action arose from or are related to its contacts with California. Analytically, these arguments are more pertinent to consideration of whether the exercise of specific jurisdiction is reasonable, not whether the contested claims arise from or relate to the company's forum activities. The questions raised by BMS ... do not bear upon the issue of whether the nonresident plaintiffs' claims arise from or are related to BMS's activities in the forum state. Accordingly, we will examine these arguments using the criteria governing reasonableness.

*Id.*, 1 Cal. 5th at 808, 377 P.3d at 891.

The California court's analysis of the fairness factors laid out by this Court in *World-Wide Volkswagen* was clear and accurate. Bristol-Myers Squibb failed to show that it was unduly burdened by the consolidation of litigation in California (as opposed to litigating in 34 different states), failed to disprove California's interest in adjudicating the dispute involving both numerous California claimants as well as a jointly liable California co-defendant, and failed to show that there was a more efficient alternative to going forward in a consolidated action in California. Such proof could have defeated jurisdiction, but Bristol-Myers Squibb lost that issue. Attempting to recast the identification of a connection between the issue in suit and the California forum as another "fairness" step misreads *Daimler AG*:

> ***First***, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. ***Then, in a second step***, the court is to consider several additional factors to assess the reasonableness of entertaining the case.

*Daimler AG*, 134 S. Ct. at 762 (emphasis added). These are clearly two ***separate*** steps.

Blurring the lines between *Daimler AG*'s two steps may suit Bristol-Myers Squibb's agenda in this case, but it does great violence to the clarity of the process as laid out by this Court just three years ago in *Daimler AG*

**D. When narrowing the scope of general jurisdiction, neither *Daimler AG* nor *Goodyear Dunlop Tires* evinced any**

**intention of neutering 28 U.S.C. § 1407 or Rule 23 (and other similar rules for aggregate treatment of claims under state and federal law); whether the application of rules for the aggregate treatment of related claims is jurisdictionally reasonable should be addressed as part of *Daimler AG*'s second step.**

In this case, Bristol-Myers Squibb's Plavix flowed into California where it caused injury, the claims concern the nationwide promotion of Plavix associated with Bristol-Myers Squibb's California-based marketing staff, and those claims assert joint liability between Bristol-Myers Squibb and a California co-defendant Bristol-Myers Squibb contracted with, McKesson Corp. *Bristol-Myers Squibb*, 1 Cal. 5th at 788-89, 798, 803, 811, 377 P.3d at 877-78, 884, 888, 893. The California court correctly found that this connection between the claims in suit and the California forum was sufficient to proceed to the fairness analysis.

Bristol-Myers Squibb's arguments against simultaneously litigating the identical claims brought by non-California residents is an attack on all nationwide multi-district consolidated litigation. If the aggregation of claims was a Due Process violation, then Bristol-Myers Squibb's complaint has much broader implications than its petition acknowledges because nothing in the Due Process Clause exempts federal class actions or federal multi-district litigation. Moreover, nothing in this Court's most recent personal jurisdiction cases implies such a fundamental change in the law as to effectively forbid

nationwide consolidated litigation.[2] Yet – even in the absence of precedence – the unspoken assumption underlying Bristol-Myers Squibb's petition is that no court has the jurisdiction to litigate nationwide disputes involving two or more defendants which are at home in different states. If it were truly a Due Process violation for California to exercise jurisdiction over the parties in this dispute, then what other forum would the Due Process Clause permit to hear a nationwide dispute against both Bristol-Myers Squibb and McKesson Corp.?

## II. THIS COURT SHOULD CLARIFY THAT ASSESSING SPECIFIC JURISDICTION IN PRODUCT CASES INCLUDES STREAM-OF-COMMERCE ANALYSIS.

Bristol-Myers Squibb holds this case out as an opportunity for the Court to clarify the standards for asserting specific personal jurisdiction in product cases. Yet Bristol-Myers Squibb's petition does not even address the application of the stream-of-commerce doctrine. How can this Court be expected to clarify the standards for asserting specific personal jurisdiction in product cases without addressing the stream of commerce?

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[2] For example, both *Daimler AG* and *Goodyear Dunlop Tires* repeatedly cite to *Jurisdiction to Adjudicate: A Suggested Analysis*, which advocates for an expansive view of specific jurisdiction to adjudicate multiparty matters calling for a unified resolution where defendants' commercial involvement in multistate activity harmed the claimants. *See* A. Von Mehren, D. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1161-71 (1966).

### A. *World-Wide Volkswagen*

Thirty-eight years ago, this Court confirmed that a "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98, 100 S. Ct. 559, 567 (1980). Obviously, this is exactly what Bristol-Myers Squibb did with regard to Plavix in the California forum.

*World-Wide Volkswagen* involved a vehicle made by Audi NSU Auto Union Aktiengesellschaft, imported to the US by Volkswagen of America, Inc., distributed in New York by World-Wide Volkswagen Corp., sold in New York by Seaway Volkswagen, Inc., and crashed in Oklahoma. *Id.*, 444 U.S. at 288, 100 S. Ct. at 562. This Court found these facts sufficient for Oklahoma to exercise jurisdiction over the manufacturer Audi and the importer Volkswagen but insufficient for the exercise of jurisdiction over the regional distributor World-Wide or seller Seaway:

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla*, 357 U.S., at 253, 78 S.Ct., at 1240, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a

> manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. ... ***But there is no such or similar basis for Oklahoma jurisdiction over World-Wide or Seaway in this case.***

*Id.*, 444 U.S. at 297–98, 100 S. Ct. at 567 (emphasis added). In the case now before the Court, Bristol-Myers Squibb is in the position of the manufacturer (which was subject to jurisdiction) rather than regional distributor and seller (which were not subject to jurisdiction).

### B. *Burger King*

This Court next addressed stream-of-commerce analysis in *Burger King Corp. v. Rudzewicz*, where the Court listed several reasons why a forum "does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum":

> A State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. *Id.*, at 223, 78 S.Ct., at 201; see also *Keeton v. Hustler Magazine, Inc., supra,*

> 465 U.S., at 776, 104 S.Ct., at 1479. Moreover, where individuals "purposefully derive benefit" from their interstate activities, *Kulko v. California Superior Court,* 436 U.S. 84, 96, 98 S.Ct. 1690, 1699, 56 L.Ed.2d 132 (1978), it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.

*Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 473–74, 105 S. Ct. 2174, 2182–83 (1985). This Court's analysis in the *Burger King* case is consistent with the California court's analysis in the case under review because the court noted (1) California's interest in providing a convenient forum, (2) Bristol-Myers Squibb has purposefully derived a benefit from its interstate activities, and (3) it is less burdensome for Bristol-Myers Squibb to litigate in California where it engages in significant economic activity.

### C. *Asahi Metal Industry*

Two years later, the Court revisited the stream of commerce as a source of a product defendant's jurisdictionally significant contact with the forum in *Asahi Metal Indus. Co., Ltd. v. Superior Court of California,* which presented "the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes 'minimum contacts'

between the defendant and the forum State such that the exercise of jurisdiction 'does not offend "traditional notions of fair play and substantial justice."'" *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 105, 107 S. Ct. 1026, 1028–29 (1987) (O'Connor, J., plurality, quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945)). Justice O'Connor's four-judge plurality and Justice Brennan's four-judge concurrence reached the same answer to this question, but Justice O'Connor and Justice Brennan followed slightly different paths to the same conclusion. Justice O'Connor found the fact that a nonresident defendant placed its product into the stream of commerce to be a jurisdictionally significant fact that must be accompanied by some other additional (but not necessarily related) conduct directed toward the forum:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

*Id.*, 480 U.S. at 112, 107 S. Ct. at 1032 (O'Connor, J., plurality). Justice Brennan agreed with Justice O'Connor that the exercise of jurisdiction over Asahi Metal would

violate the concept of fair play and substantial justice, but he disagreed with her formulation of the stream-of-commerce test as requiring proof of additional conduct:

> [Justice O'Connor] states that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Ante,* at 1033. Under this view, a plaintiff would be required to show "[a]dditional conduct" directed toward the forum before finding the exercise of jurisdiction over the defendant to be consistent with the Due Process Clause. *Ibid.* I see no need for such a showing, however. The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in

> the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.

*Id.*, 480 U.S. at 116–17, 107 S. Ct. at 1034–35 (Brennan, J., concurring).

Bristol-Myers Squibb is correct when it argues that there is a vigorous debate on the standards for assessing specific personal jurisdiction in product cases, but then Bristol-Myers Squibb misstates the scope and nature of that debate. In product liability cases, the key debate in the case law is between Justice O'Connor's stream-of-commerce-plus[3] standard and Justice Brennan's stream-of-

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[3] The First, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have decisions that favor Justice O'Connor's stream-of-commerce-plus formulation. *See, e.g., Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994); *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472 (6th Cir. 2003); *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007); *Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Co-op.*, 812 F. Supp. 1139, 1144 (D. Kan. 1993), *aff'd*, 17 F.3d 1302 (10th Cir. 1994); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir.1993).

commerce[4] standard. Either of these standards subsumes the discussion of the "relatedness" of the defendant's contacts with the forum because the placement of the product into the stream of commerce with the intention of directly or indirectly serving the forum is the minimum contact which serves as the predicate for proceeding on to the fairness analysis (regardless of whether the Court follows Justice O'Connor's formulation of the test or Justice Brennan's). Bristol-Myers Squibb's efforts to graft a conduct-focused analysis from non-product cases into the specific personal jurisdiction standard for product cases makes little sense because product liability focuses on the product and not the defendant's conduct. *See, e.g., Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 957 (6th Cir. 2011) ("strict tort liability shifts the focus from the conduct of the manufacturer to the nature of the product"); *Stupak v. Hoffman-La Roche, Inc.*, 326 Fed. Appx. 553, 557 (11th

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[4] The Fifth, Seventh, Eighth, and D.C. Circuits employ Justice Brennan's stream-of-commerce formulation. *See, e.g., Eddy v. Printers House (P) Ltd.*, 627 Fed. Appx. 323, 326 (5th Cir. 2015); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir.1992); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994), *cert. den.*, 513 U.S. 948 (1994); *Burman v. Phoenix Worldwide Industries, Inc.*, 437 F. Supp. 2d 142 (D.D.C. 2006). The Second, Third, and Federal Circuits have opinions recognizing both stream-of-commerce and stream-of-commerce-plus analysis, but these Circuits have not yet decided between the two models. *See, e.g., Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 244 (2d Cir. 1999); *Pennzoil Products Co. v. Colelli & Associates, Inc.*, 149 F.3d 197, 205 (3d Cir. 1998); *Polar Electro Oy v. Suunto Oy*, 829 F.3d 1343, 1349 (Fed. Cir. 2016).

Cir. 2009) ("strict products liability focuses not on the defendant's conduct, but on the nature of the defendant's product"); *Binakonsky v. Ford Motor Co.*, 133 F.3d 281, 285 (4th Cir. 1998) ("a strict liability action focuses not on the conduct of the manufacturer but rather on the product itself"); *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1411 (10th Cir. 1988) ("strict liability actions ... focus not on the reasonableness of a defendant's conduct but on the product"); *Toner for Toner v. Lederle Labs., a Div. of Am. Cyanamid Co.*, 828 F.2d 510, 512 (9th Cir. 1987) ("negligence focuses upon the conduct of the manufacturer while strict liability focuses upon the product and the consumer's expectation); *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 621 (8th Cir. 1983) ("in negligence cases the inquiry focuses on the reasonableness of the defendant's conduct, in typical products liability cases the inquiry focuses not on the defendant's conduct but on the safety of the product").

### D. *Goodyear Dunlop Tires*

This Court next addressed the issue in *Goodyear Dunlop Tires*, where the Court reiterated the point that many states "exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum" if "a nonresident defendant, acting outside the forum, places in the stream of commerce a product that ultimately causes harm inside the forum":

> The stream-of-commerce cases ... relate to exercises of specific jurisdiction in products liability actions, in which a nonresident defendant, acting outside the forum, places in the stream of commerce a product that

> ultimately causes harm inside the forum. Many state long-arm statutes authorize courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum State. ... Flow of a manufacturer's products into the forum may bolster an affiliation germane to ***specific*** jurisdiction, *see, e.g., World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490....

*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2849 (2011). This is a fair summary of the specific jurisdiction law as applied to product cases since 1980. Bristol-Myers Squibb does not want a "clarification" of this standard; Bristol-Myers Squibb wants a new standard because it cannot prevail under this specific jurisdiction test as clearly set forth in *Goodyear Dunlop Tires.*

### E. *J. McIntyre Machinery*

On the same day as the *Goodyear Dunlop Tires* decision, this Court further addressed specific jurisdiction for product cases in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 131 S. Ct. 2780 (2011). As with the earlier *Asahi Metal* case, no opinion achieved a majority of support. Justice Kennedy's plurality opinion in *J. McIntyre* held that jurisdiction is properly premised on placing goods into the stream of commerce where the manufacturer uses a distributor to seek to serve the forum state's market by sending its goods to that market:

This Court has stated that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may indicate purposeful availment. *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) (finding that expectation lacking). But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors "seek to serve" a given State's market. *Id.*, at 295, 100 S.Ct. 559. The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson, supra,* at 253, 78 S.Ct. 1228; *Insurance Corp., supra,* at 704–705, 102 S.Ct. 2099 ("[A]ctions of the defendant may amount to a legal submission to the jurisdiction of the court"). Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have

> predicted that its goods will reach the forum State.

*J. McIntyre*, 564 U.S. at 882, 131 S. Ct. at 2788 (Kennedy, J., plurality). This is precisely what Bristol-Myers Squibb did regarding its Plavix-related contracts with co-defendant distributor, McKesson Corp., and its other California connections. There can be no doubt that Bristol-Myers Squibb's activities manifest an intention to submit to the power of California's courts because Bristol-Myers Squibb does not dispute the jurisdiction of the California courts to hear the claims of the California residents.

In contrast to Justice Kennedy's focus on whether the placement of products into the stream of commerce manifests an intent to submit to the power of a sovereign forum in order to serve (and benefit from) that forum's market, Justice Ginsberg's dissent (joined by Justices Sotomayor and Kagan) analyzed the stream of commerce through the lens of fairness:

> "Th[e] 'purposeful availment' requirement," this Court has explained, simply "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U.S., at 475, 105 S.Ct. 2174. .... Courts, both state and federal, confronting facts similar to those here, have rightly rejected the conclusion that a manufacturer selling its products across the USA may evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury. They have

held, instead, that it would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where the manufacturer's products caused injury. See, *e.g.*, *Tobin v. Astra Pharmaceutical Prods., Inc.*, 993 F.2d 528, 544 (C.A.6 1993); *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 573, 892 P.2d 1354, 1362 (1995) .... *World–Wide Volkswagen* concerned a New York car dealership that sold solely in the New York market, and a New York distributor who supplied retailers in three States only: New York, Connecticut, and New Jersey. 444 U.S., at 289, 100 S.Ct. 559. New York residents had purchased an Audi from the New York dealer and were driving the new vehicle through Oklahoma en route to Arizona. On the road in Oklahoma, another car struck the Audi in the rear, causing a fire which severely burned the Audi's occupants. *Id.*, at 288, 100 S.Ct. 559. Rejecting the Oklahoma courts' assertion of jurisdiction over the New York dealer and distributor, this Court observed that the defendants had done nothing to serve the market for cars in Oklahoma. *Id.*, at 295–298, 100 S.Ct. 559. ... Notably, the foreign manufacturer of the Audi in *World–Wide Volkswagen* did not object to the jurisdiction of the Oklahoma courts and the U.S. importer abandoned its initially stated objection. 444 U.S., at 288, and n. 3, 100 S.Ct. 559. And most relevant here, the Court's opinion indicates that an objection to

> jurisdiction by the manufacturer or national distributor would have been unavailing. To reiterate, the Court said in *World–Wide Volkswagen* that, when a manufacturer or distributor aims to sell its product to customers in several States, it is reasonable "to subject it to suit in [any] one of those States if its allegedly defective [product] has there been the source of injury." *Id.*, at 297, 100 S.Ct. 559.

*Id.*, 564 U.S. at 905–07, 131 S.Ct. at 2801-02 (Ginsberg, J., dissenting). Under Justice Ginsberg's formulation of the stream-of-commerce analysis, Bristol-Myers Squibb's nationwide marketing of Plavix constitutes the purposeful availment of the California market to a degree that haling Bristol-Myers Squibb into the California court system is not based on a mere random contact with the forum.

In juxtaposition to Justice Kennedy's emphasis on the stream of commerce as a reflection of acquiescence to sovereignty and Justice Ginsberg's focus on the stream of commerce in the context of fairness, Justice Breyer's concurrence (joined by Justice Alito) highlighted the stream of commerce's more practical applications:

> Mr. Nicastro, who here bears the burden of proving jurisdiction, ... has not ... shown that the British Manufacturer "purposefully avail[ed] itself of the privilege of conducting activities" within New Jersey, or that it delivered its goods in the stream of commerce "with the expectation that they will be purchased" by New Jersey users. *World–Wide*

> *Volkswagen, supra,* at 297–298, 100 S.Ct. 559 (internal quotation marks omitted).... Accordingly, on the record present here, resolving this case requires no more than adhering to our precedents ... The plurality seems to state strict rules that limit jurisdiction where a defendant does not "inten[d] to submit to the power of a sovereign" and cannot "be said to have targeted the forum." *Ante,* at 2788. But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.

*Id.*, 564 U.S. at 888–90, 131 S. Ct. at 2792-93 (Breyer, J., concurring). Justice Breyer's focus on the practical applications of stream-of-commerce analysis recognized that a one-size-fits-all approach might not be equally fair to both large companies and smaller companies alike:

> What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an

> Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). ... It may be that a larger firm can readily "alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World–Wide Volkswagen, supra,* at 297, 100 S.Ct. 559. But manufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good.

*Id.*, 564 U.S. at 891–92, 131 S. Ct. at 2793-94. Under Justice Breyer's analysis, the fact that Bristol-Myers Squibb is a multinational pharmaceutical conglomeration as opposed to a small Appalachian potter or Kenyan coffee farmer calls for a Due Process and fairness analysis that reflects Bristol-Myers Squibb's enhanced role in (and benefit from) the stream of commerce.

Regardless of whether the Court looks to Justice Kennedy's submission-to-sovereignty view of the stream of commerce, or Justice Ginsberg's focus on the stream of commerce through the lens of fairness, or Justice Breyer's

practical view of the stream of commerce, *J. McIntyre*'s various forms of stream-of-commerce analysis all take the place of any "relatedness" analysis that typifies the jurisdictional scrutiny of some intentional tort cases.

### F. *Daimler AG*

Three years later, the Court went on to repeat that the "rapid expansion of tribunals' ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum" reflects the development of "specific jurisdiction [as] ... a considerably more significant part of" jurisdictional analysis, citing *Asahi Metal* and *World–Wide Volkswagen* among other cases:

> *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (opinion of O'Connor, J.) (specific jurisdiction may lie over ***a foreign defendant that places a product into the "stream of commerce" while also*** "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or ***marketing the product through a distributor who has agreed to serve as the sales agent in the forum State***"); *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) ("[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated

> occurrence, but arises from the efforts of the manufacturer or distributor to serve, ***directly or indirectly***, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."); ...

*Daimler AG v. Bauman*, 134 S. Ct. 746, 755 n. 7, 187 L. Ed. 2d 624 (2014) (emphasis added). In this context, the *Daimler AG* decision confirmed that "the placement of a product into the stream of commerce 'may bolster an affiliation germane to ***specific*** jurisdiction.'" *Id.*, 134 S. Ct. at 757 (quoting *Goodyear Dunlop Tires*, 131 S. Ct. at 2849).

Under the clear two-part test discussed in the *Daimler AG* decision, the connection between the California forum and the claims in suit involving Plavix placed into the stream of commerce in California and also involving marketing associated with the California sales representatives is a sufficient basis to reach the fairness concerns which are part of the separate step in the process. *See id.*, 134 S. Ct. at 762. Under *Daimler AG*'s second separate fairness step, none of the factors show an unfair burden on Bristol-Myers Squibb that outweighs the greater efficiency achieved by trying the related claims in the California courts. Bristol-Myers Squibb wants this Court to adopt a new test simply because it does not prevail under the tests this Court has consistently applied for decades.

### G. From *World-Wide Volkswagen* through *Daimler AG*, the stream of commerce has continuously defined the "relatedness" of a forum to cases against product defendants.

For 38 years, this Court has recognized the propriety of exercising jurisdiction based on the placement of a product into the stream of commerce where that product has then caused harm in a forum where the defendant has deliberately and repeatedly serviced that forum's market. In *World-Wide Volkswagen*, the placement of the product into the stream of commerce where it caused harm in the forum directly or indirectly serviced by the defendant was followed immediately by a separate fairness analysis. Likewise, under Justice O'Connor's view of *Asahi Metal*, the demand for "more" in addition to the stream-of-commerce analysis (the same "more" which was a feature of the fairness step in *World-Wide Volkswagen*) was appended onto her stream-of-commerce-plus analysis but was never intended to replace the stream-of-commerce analysis. *Asahi Metal*, 480 U.S. at 112, 107 S. Ct. at 1032 (O'Connor, J., plurality). Stream-of-commerce analysis has a similar place in Justice Kennedy's submission-to-a-sovereign concept. *J. McIntyre*, 564 U.S. at 882, 131 S. Ct. at 2788 (Kennedy, J., plurality). *Daimler AG* (building on *Goodyear Dunlop Tires* before it) has reconfirmed a clear two-step framework in which the stream-of-commerce provides the connection to the forum combined with a separate second Due Process step to safeguard against any unfairness potentially arising from a small defendant that infrequently sells its products in the forum's market.

Notwithstanding almost four decades of stream-of-commerce analysis, Bristol-Myers Squibb would have this Court rewrite the boundaries of specific personal jurisdiction (and erase national class actions, multidistrict litigation, and mass torts involving defendants at home in different states) by replacing stream-of-commerce analysis

tempered by fairness considerations with a new "relatedness" doctrine extended as a novelty to product cases. This Court should pass on Bristol-Myers Squibb's invitation.

## III. THIS COURT SHOULD CLARIFY THAT THE TEST FOR SPECIFIC PERSONAL JURISDICTION IN PRODUCT CASES IS A HOLISTIC STANDARD THAT BALANCES THE FAIRNESS TO ALL PARTIES, INCLUDING CLAIMANTS AND LOCAL DEFENDANTS AS WELL AS MULTI-NATIONAL DEFENDANTS.

The consensus among Justice Breyer's *J. McIntyre* concurrence (joined by Justice Alito) and Justice Ginsberg's dissent (joined by Justices Kagan and Sotomayor) suggests that multinational product defendants have benefited sufficiently from the nation's markets such that their fairness analysis should accommodate more responsibility than the level which would unfairly burden a small Appalachian pottery maker.

Yet this proportionality should not be limited to Appalachian pottery makers. In many states, when a product manufacturer finds a way to escape the courts' jurisdiction, then the local retailer stands in the shoes of the absent manufacturer.[5] Large national or global

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[5] The Uniform Product Liability Act proposes that local retailers should generally not be responsible for defective products they sell without knowledge of the defect unless the courts cannot obtain jurisdiction over the nonresident manufacturer, in which circumstance the seller becomes

companies like Bristol-Myers Squibb cannot simply shirk their jurisdictional responsibilities without visiting consequences upon the local businesses left to stand in the manufacturer's shoes. Allowing Bristol-Myers Squibb to evade jurisdiction either will lead to a misallocated financial burden sloughed off from Bristol-Myers Squibb to the shoulders of local businesses who remain subject to the courts' jurisdiction or will lead to indemnification litigation which would undermine efficiency by letting Bristol-Myers Squibb out of the courts' front door only to bring Bristol-Myers Squibb back into the dispute through a side door. Neither alternative is satisfactorily efficient.

Instead of creating a new standard for specific personal jurisdiction in product cases, as Bristol-Myers

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liable in the manufacturer's place. *See* Model Unif. Prod. Liab. Act § 105c, 44 Fed. Reg. 62,714, 62,726 (Oct. 31, 1979). This model has been followed by numerous states, including Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, New Jersey, North Carolina, North Dakota, Ohio, Tennessee, Texas, Washington, and others. *See, e.g.*, Colo. Rev. Stat. § 13-21-402; Del. Code Ann. tit. 18, § 7001(c)(2); Idaho Code Ann. § 6-1407(4)(a); 735 Ill. Comp. Stat. 5/2–621(b)(3); Ind. Code Ann. § 34-20-2-4; Iowa Code Ann. § 613.18; Kan. Stat. Ann. § 60-3306 (b)(3)(C); Ky. Rev. Stat. Ann. § 411.340; La. Stat. Ann. § 9:2800.53(1)(d); Md. Code Ann., Cts. & Jud. Proc. § 5-405(c)(1); Minn. Stat. Ann. § 544.41(2)(3); Mo. Rev. Stat. § 537.762(2); N.J. Stat. Ann. § 2A:58C-9(c)(2); N.C. Gen. Stat. Ann. § 99B-2; N.D. Cent. Code § 28-01.3-04(2); Ohio Rev. Code Ann. § 2307.78(B)(1); Tenn. Code Ann. § 29-28-106(4); Tex. Civ. Prac. & Rem. Code § 82.003(a)(7)(B); Wash. Rev. Code Ann. § 7.72.040(2)(a).

Squibb proposes, this Court should simply apply the same fairness standards as the Court has applied for decades:

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko v. California Superior Court, supra*, 436 U.S., at 92, 98 S.Ct., at 1697, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. *Shaffer v. Heitner*, 433 U.S. 186, 211, n. 37, 97 S.Ct. 2569, 2583, n. 37, 53 L.Ed.2d 683 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see *Kulko v. California Superior Court, supra*, 436 U.S. at 93, 98, 98 S.Ct., at 1697, 1700.

*World-Wide Volkswagen*, 444 U.S. at 292, 100 S. Ct. at 564–65. Jurisdiction is reasonable under these well-accepted standards, and California's exercise of jurisdiction should be affirmed.

## CONCLUSION

The Court should reaffirm that specific jurisdiction should be assessed using the two-step process recently reconfirmed in *Daimler AG*. In answering the first question about whether the connection between the forum and the episode-in-suit could justify specific jurisdiction, the Court should reconfirm that – in product cases – this question is appropriately answered in light of four decades of this Court's decisions confirming that a manufacturer which regularly places its product into the stream of commerce intending to serve the forum's market has established contacts that could justify specific jurisdiction. Finally, when answering the second question about the five *World-Wide Volkswagen* fairness factors to assess the reasonableness of entertaining jurisdiction, the Court should confirm that reasonableness as applied to a massive global manufacturer with extensive operations in all fifty states, including the forum, should be a more accommodating to accepting jurisdiction than a small Appalachian potter or Kenyan coffee farmer.

Respectfully submitted,

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April 7, 2017

RECORD AND BRIEFS

FILED
APR - 7 2017

No. 16-466

# In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

*Respondents.*

On Writ of Certiorari to the California Supreme Court

## BRIEF OF THE CALIFORNIA CONSTITUTION CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE* [1]

*Amicus curiae* the California Constitution Center is a non-partisan academic research institution at the University of California, Berkeley School of Law. It is the first and only center at any law school devoted exclusively to studying the constitution and high court of the state of California. Toward that end, the Center publishes scholarly articles and commentary, conducts conferences, and selectively participates as *amicus curiae* in cases raising significant constitutional issues that implicate or affect California constitutional law.

## SUMMARY OF ARGUMENT

California's exercise of personal jurisdiction over Petitioner in this case is well within its constitutional authority. Petitioner's attempt to impose, under the guise of due process, a plaintiff- and claim-specific territorial causation requirement for personal jurisdiction is deeply flawed. Such a partial reversion to territorial causation requirements, while continuing to reject the sufficiency of territorial presence for personal jurisdiction, would stray further from the original understandings of jurisdiction and due process, convert limited due-process constraints into an invitation to engage in judicial policy making, and aban-

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the written blanket consent of all parties, on file with this Court.

don the respect and deference owed to the States and the political branches.

Where, as here, there is no dispute that the California courts have personal jurisdiction over Petitioner as to identical claims by numerous California plaintiffs and have personal jurisdiction over California co-defendant McKesson as to identical claims by *all* plaintiffs, the debate whether non-resident plaintiffs already properly before the courts can *also* join their identical claims against Petitioner is a question of public policy, not constitutional law.

1. Demanding territorial causation for each plaintiff and claim as a necessary component of personal jurisdiction over a defendant is contrary to the original understandings of both personal jurisdiction and due process. As understood when the Due Process Clauses of the Fifth and Fourteenth Amendments were adopted, a court's jurisdiction over persons turned on physical presence in the territory of the relevant sovereign. Even absent personal physical presence, jurisdiction still existed where a person had assets within the relevant territory, at least to the extent of collecting upon such assets. Companies likewise were subject to such territorial jurisdiction based upon the presence of their agents or property within the relevant geography.

While this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), shifted away from the formalistic original understanding of personal jurisdiction, it struck a balance with a more flexible approach that contracted general jurisdiction while expanding specific jurisdiction. Petitioner's attempt to abandon that balance, imposing formalistic and non-

traditional territorial limits on specific jurisdiction while continuing to eschew traditional territorial anchors for general jurisdiction, undermines the logic of *International Shoe* and moves further away from the original understanding of both personal jurisdiction and due process. Such an a-textual and counter-historical evolution of the Due Process Clause should not be endorsed by this Court.

2.a. The scattershot challenges by Petitioner and its *amici* to the fairness of joining non-resident plaintiffs in mass-tort actions are contrary to the limited scope of due-process claims generally and invite this Court to resolve a political tug-of-war beyond its proper purview. Turning primarily on complaints about forum shopping and the supposed bias of the courts selected by mass-tort plaintiffs, such arguments only thinly explore a hotly debated public-policy issue and do not remotely suggest the type of extreme unfairness that would rise to the level of a constitutional due process violation.

Forum-shopping objections, for example, are particularly suspect given that nationwide companies likewise forum shop in choosing where to incorporate or locate their principal places of business. While a variety of factors influence such locational choices, selecting and channeling the fora available to those suing the company, and especially the fora available for mass tort and other collective suits, is certainly a significant consideration. Additionally, while companies cannot guarantee that all cases will be brought in their favored States – plaintiffs can always sue in their own State of residence -- companies (and Petitioner here) also seek to ensure that any injured con-

sumers unwilling to sue in the company-selected fora will be dispersed and deprived of the financial and practical efficiencies of joining suit with others similarly injured. In short, to the extent defendants cannot impose their own forum-shopping preferences, they will settle for forum *splitting* instead.

The related accusation that courts may be engaged in "forum selling" is offensive, unsupported, and, if true, would likely cut the other way. In any event, this Court should not lightly countenance such aspersions on the integrity of state court jurists.

The point here is not necessarily to defend or disparage both sides' efforts to have some say over the available fora or the number of plaintiffs able to join a collective suit, but rather to highlight that these are *competing* positions and deal with a balance of interests between businesses and consumers. As such, they are best resolved by those empowered with policy-making discretion – be it state legislatures and state courts, or Congress exercising its authority under the Commerce Clause, the Full Faith and Credit Clause, or its power to expand federal court jurisdiction if it questions the fairness of state court adjudications. But in all instances, absent extreme examples of abuse in individual cases, these are political questions, not due-process concerns demanding inflexible constitutional intervention by this Court.

To the extent there are palpable examples of unfairness in specific cases, those are best addressed in as-applied challenges to the exercise of jurisdiction or to the supposedly unfair procedures being applied. As-applied challenges would have the benefit of a fully developed record, of the exhaustion of alternative

remedies to correct or mitigate any alleged unfairness, and are more in keeping with this Court's practice regarding broad constitutional challenges to laws covering a diversity of situations. As Respondents have noted, Resp. Br. at 11, no such as-applied challenge can be sustained here given Petitioner's concession below regarding the fairness and reasonableness of jurisdiction in this case.

b. The current attacks by Petitioner and its *amici* on California as a fair forum for mass torts are misguided and incorrect.

First, on a broad level, the California courts already have jurisdiction over identical claims against Petitioner by California plaintiffs and over identical claims against co-defendant McKesson by all plaintiffs. Petitioner does not contend that the behavior and rules of the California courts violate due process regarding any of those plaintiffs and claims. Indeed, any supposed bias in the California system presumably would skew more in favor of *resident* plaintiffs hence, *a fortiori*, if there is no actionable unfairness as to claims by them, there can be no actionable unfairness in favor of non-resident plaintiffs.

Second, at a concrete level, California courts are more than sufficiently fair to business defendants. On choice-of-law issues, the California courts are quite attentive to the policy interests of other States, particularly pro-business interests of States seeking to attract companies and economic activity. The suggestions by some *amici* to the contrary are mistaken and, at best, out of date.

Finally, objections to the practical difficulties of mass-tort litigation involving multi-state parties are

hardly unique to California, apply with even greater force to Petitioner's "home" fora, and, to the extent they pose a meaningful problem in a given case, can be solved or mitigated by existing remedies or doctrines. None of those alleged difficulties, however, come even close to the level of a due-process violation. They are merely the inconveniences of having to litigate the consequences of actions that span a wide geography and may be subject to the substantive jurisdiction of multiple sovereigns. To the extent such multi-jurisdiction difficulties should be addressed systematically, it should be done by Congress or through multi-state coordination, not by this Court.

## ARGUMENT

Petitioner and its *amici* caricature this case and the surrounding issues as a clash between "forum shopping" plaintiffs' lawyers and innocent companies abused by unfair lawsuits in distant and alien venues. That is a common and misleading trope used to mask an unremarkable policy debate on how to balance the competing interests of consumers and businesses. The Constitution affords the States and the federal government broad latitude in striking the appropriate balance of those interests. This Court has little role in that political debate, absent such a severe departure from "traditional" notions of fairness that this Court is obliged to cabin the policy choices of the States or of Congress. Nothing in this case, or in the California Supreme Court's finding of personal jurisdiction, even comes close to such boundaries, whether as a matter of an original understanding of the allowable breadth of personal jurisdiction or as a

matter of this Court's usual due-process jurisprudence.

## I. The Original Understanding of Personal Jurisdiction and Due Process Amply Support Jurisdiction in this Case.

*Amici* agree with Respondents that the jurisdictional rule Petitioner seeks is contrary to the original understandings of personal jurisdiction, due process, and the proper role of state courts in adjudicating disputes throughout the country. *See* Resp. Br. at 33-35. While this Court's jurisprudence has moved away from that understanding – simultaneously expanding and contracting personal jurisdiction by reducing the role of territorial "presence" – Petitioner seeks to disrupt the balance struck in *International Shoe* and contract personal jurisdiction still further. If the Court is to abandon the flexible approach of *International Shoe* in favor of a renewed emphasis on territorialism, then it should do so in a direction that moves the jurisprudence *closer* to the original understanding on such matters, not further away.

Regarding whether allowing California to assert jurisdiction in this case offends "traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316 (internal quotation marks omitted), it is worth noting that as a "traditional" matter the exercise of personal jurisdiction here is obvious and uncontroversial. At the time of the Founding, the jurisdiction of a court over persons was uniformly understood to be based on physical presence within the territory and by service of process therein. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) (discussing the "well-

established principles of public law respecting the jurisdiction of an independent State over persons and property," which establish that "except as restrained and limited by [the Constitution], * * * every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"); *id.* at 724 (noting that the adjudicatory power of States over persons and property in their territory is "not new," citing Justice Story in *Piquet v. Swan*); *Picquet v. Swan*, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (Story, Circuit Justice) (discussing common-law and general jurisprudence regarding the authority of a State such that "Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced, on such process, against him.").

Indeed, the notion that service of process within the territory covered by a court was sufficient to confer personal jurisdiction derived from pre-existing principles of international law. *Pennoyer*, 95 U.S. at 730 (" 'The international law,' said the court, 'as it existed among the States in 1790, was that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence.' ") (quoting *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1851)).

Under "traditional" and original understandings of state-court jurisdiction over persons and property, the California courts have valid personal jurisdiction over Petitioner because Petitioner is "present" in California, via numerous employees, agents, and consid-

erable property. Indeed, because a corporation's existence and hence presence is a creature of state law to begin with, States traditionally could condition a corporation's doing business in the State on appointing an agent for the service of process. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1869) ("Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."). Petitioner, of course, has an agent for accepting process in California. Resp. Br. at 5.

Even were corporate presence in doubt here, California could easily establish jurisdiction to enforce any judgment in this case at least to the extent of Petitioner's property within the State. *Picquet*, 19 F. Cas. at 612 ("Where [a party] is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may by attachment go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property").

Such traditional views likewise extend to any limits imposed by the Due Process Clause. As *Pennoyer*

noted, due process merely provides that proceedings to determine the "personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." 95 U.S. at 733. But in the context of personal jurisdiction, all that is required is "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights," such that if the proceeding "involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." *Id.*

That mere presence alone is a sufficient basis for personal jurisdiction under an original understanding of the Due Process Clause can also be seen in the rules concerning jurisdiction over natural persons. In *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), this Court held that the California courts had general personal jurisdiction over an individual personally served in the State. Speaking for a plurality of the Court, Justice Scalia wrote that "[a]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. * * * [That] understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted." *Id.* at 611.

Indeed, having conceded personal jurisdiction as to the claims brought by California residents, there is no question that the California Courts have adjudicatory power over the company. From a traditional

perspective, therefore, there is no unfairness in California's current exercise of personal jurisdiction over Petitioner.

To be sure, *International Shoe* changed the traditional approach and substituted a more flexible and less territorial approach to personal jurisdiction as applied to corporate defendants. That approach simultaneously contracted general jurisdiction yet created an expanded specific jurisdiction, making territorial presence insufficient for the former and no longer necessary for the latter. Resp. Br. at 16.

What Petitioner seeks now is to revive a territorial requirement for specific jurisdiction, arguing that central causative events for each claim and plaintiff must have occurred within California in order for specific personal jurisdiction to exist. Pet. Br. at 11, 16-17; *Cf.* Brief of *Amicus Curiae* GlaxoSmithKline LLC in Support of Petitioner ("GSK *Amicus* Br.") at 26-29 (Mar. 8, 2017) (insisting on a territorial proximate-cause test, not merely a but-for test).

But there is no justification for only partially disrupting the balance struck in *International Shoe*. If this Court were to revive territorialism as the touchstone of personal jurisdiction, then it should go all the way in restoring an original understanding of such matters, reviving physical presence jurisdiction and *in rem* or *quasi-in-rem* jurisdiction. Certainly, this Court could rely on precedent and stick with the flexible compromise struck in *International Shoe*, and the broad scope of specific jurisdiction reflected therein. But if territorialism is to be revived, this Court should take as its guide the historical and original views on jurisdiction and due process, rather than

malleable and changeable assertions of abstract "fairness" that boil down to little more than policy preferences in cases such as this one.

If a change is to be made, better it be done in a manner that brings us *closer* to an original understanding of the constitutional issues involved, rather than further away. Such an approach would have the virtue of cabining this Court's own exercise of policy-making power vis-à-vis the States and Congress, thereby supporting a proper allocation of authority under Our Federalism.

## II. Litigation of National Mass Torts in the California Courts Does Not Violate Traditional Notions of Fairness and Substantial Justice.

Various of Petitioner's *amici* attempt to justify more stringent constitutional limits on personal jurisdiction by attacking the integrity and fairness of state courts generally and California courts specifically. Both the general and specific attacks lack merit and certainly do not rise to the level of a constitutional due-process objection.

### A. Broadside Attacks on the Integrity of State Jurists Are Improper Bases for Cabining State Judicial Authority.

Broad complaints about forum shopping, the nefarious motives of plaintiffs' lawyers, and the supposedly self-serving behavior of state-court judges are both misguided and inaccurate.

Although it is fashionable to attack the bogeymen of "forum-shopping plaintiffs' lawyers," it is little

more than a rhetorical diversion to mask a more meaningful policy conflict between the rights and interests of consumers and businesses. Indeed, corporate counsel and the defense bar likewise "shop" for what they perceive to be favorable fora and try to use forum-*splitting* as a means to leverage their financial and litigation advantages to reduce the economic viability of fragmented suits by dispersed consumers.

That businesses forum shop no less than plaintiffs seems obvious but is often overlooked. National companies get to choose their State of incorporation and principal place of business, and do so with an eye towards favorable procedures and substantive laws. Petitioner effectively admits as much when it argues that predictability regarding personal jurisdiction is important to businesses that wish to anticipate what laws might apply to their operations and make business decisions accordingly. Pet. Br. at 29-30.

Were Petitioner to prevail in this case, individuals or small groups could, of course, still sue in their home States, but it would only be in Petitioner's chosen fora that a meaningful mass-tort action could be brought. Under Petitioner's approach, therefore, injured consumers here and elsewhere would face a Hobson's choice of acceding to a company's preferred fora or allowing that company to successfully divide and conquer the numerous victims of a mass tort through a multiplicity of geographically diffuse suits. Dividing plaintiffs and claims into as small groups as possible increases the per-claim cost of suit and raises an economic barrier to the filing and full litigation of such suits. Again, Petitioner effectively admitted as much in the courts below, arguing that if the

claims in this case were split up many might not be brought. *See* Resp. Br. at 8 (discussing Petitioner's argument below).

The related suggestion by one of Petitioner's *amici* that the California Supreme Court adopted its view of personal jurisdiction in order to "attract[] out-of-state mass tort plaintiffs and their forum-shopping counsel" is implausible and offensive. Brief of DRI-The Voice of the Defense Bar as *Amicus Curiae* in Support of Petitioner ("DRI *Amicus* Br."), at 4, 8-9 (Mar. 7, 2017). The State certainly has little interest in adding further cases to its court dockets and nothing to gain from awards to non-residents. *Cf.* Pet. App. 36a, 41a-42a (noting Petitioner's contention that this case will burden the California courts); DRI *Amicus* Br. 8 (discussing burden on California courts).

Furthermore, aside from the offensiveness of sweeping attacks on the integrity of jurists who supposedly "sell" their courts for prestige or the economic interest of the local bar, it is hard to imagine why any such temptations would be uni-directional. Under DRI's dim view of jurists, presumably being pro-defendant would attract businesses to incorporate or have primary facilities in such jurisdictions. And favoring the defense would presumably pave the road for future employment. It is far from clear why the notion of jurists incapable of being fair would skew in favor of plaintiffs rather than defendants. [2]

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[2] While attacking the neutrality of state courts is a dubious exercise, there is no question that state legislatures may, as a policy matter, enact laws and procedures that balance competing interests more or less in favor of businesses or consumers, as a reflection of their public policy. If forum shopping leads to fo-

*Amicus* here does not credit such wholesale attacks on the integrity of state courts, and neither should this Court. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (there is a "presumption of honesty and integrity in those serving as adjudicators."); *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring) ("We should not, even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor' ") (citation omitted). If there is a concrete instance of a judge acting in that manner, that is an occasion for an as-applied challenge, a motion for recusal, or the myriad other remedies for alleged judicial impropriety. It is not a reason to treat state courts in general as untrustworthy and to impose heightened and a-textual constitutional constraints on their jurisdiction.

*Amicus* is not so naïve as to think that various attempts to gain advantage are somehow absent from or contrary to our adversarial system. But it likewise is not so obtuse as to miss the irony in the defense

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rum "selling," corporations would seem to be far more attractive customers to pursue. Companies locating their businesses in a State pay considerable taxes, provide employment, and add far more to the local economy that the occasional group of plaintiffs' lawyers bringing lawsuits involving some percentage of nonresidents. *Cf. McCann v. Foster Wheeler LLC*, 225 P.3d 516, 530 (Cal. 2010) (noting that states can adopt "a rule of law limiting liability for commercial activity conducted within the state in order to provide what the state perceives is fair treatment to, and an appropriate incentive for, business enterprises," and has an "legitimate interest in attracting out-of-state companies to do business within the state, both to obtain tax and other revenue that such businesses may generate for the state, and to advance the opportunity of state residents to obtain employment and the products and services offered by out-of-state companies").

bar complaining about forum shopping and allowing plaintiffs to benefit from economies of scale. At the end of the day, the tug of war between making it easier to bring valid claims shared by large groups of people, and making it more difficult to use collective action to exert settlement pressure on defendants is a quintessential policy issue best resolved based on data and political considerations. In short, based on factors better suited to evaluation by the political branches rather than this Court.

This Court should be quite hesitant in imposing constitutional limits on state-court assertions of jurisdiction. Determining the limits imposed by historic notions of fundamental fairness should be applied with the same reticence used in determining the scope of other due process rights. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (Court must " 'exercise the utmost care whenever we are asked to break new ground in this field,' * * * lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court") (citation omitted).

### B. California Courts Are Fair Venues in Which to Litigate Mass Torts.

As for the specific complaints by Petitioner and its *amici* about the California courts, they lack both theoretical and substantive support.

At a theoretical level, many of the complaints amount to little more than a charge that "we lose cases in California," with no regard to whether such losses are deserved or undeserved. Surely a complaint of unfairness presupposes knowledge of what

the "right" answer ought to have been. Simply describing outcomes without demonstrating they were in error makes no normative point at all. Any supposed differential pattern of success or failure between state courts simply begs the question of which one deviated from the theoretically "right" pattern of outcomes. Perhaps it is Delaware, or whatever other States defendants seem to favor, that are the biased ones. Or perhaps there is a broad range of policy balances that can be struck by state legislatures and state courts, all of which are fundamentally "fair" in the constitutional sense, but which reflect different policy values, preferences, and balances. Merely complaining that the system is "unfair" because a defendant lost is the type of argument best left in the schoolyard (or made in the statehouse), not foisted upon this Court. And given that Petitioner makes no claim of unconstitutional unfairness in having to litigate against California-resident plaintiffs, who presumably would have equal or greater favor in the California courts, there is no credible claim that the California courts will unconstitutionally favor the non-resident plaintiffs who have joined in the suit.

As for the practical complaints regarding California law or the difficulties of mass-tort litigation, those again miss the mark.

For example, Petitioner and its *amici* complain about California choice-of-law rules, suggesting they complicate mass tort litigation and are biased against defendants. Pet. Br. at 32; DRI *Amicus* Br. at 12-13; GSK *Amicus* Br. at 20. But choice-of-law issues have little to do with personal jurisdiction and would arise in identical fashion for mass-tort suits brought

against Petitioner or any other defendant in their "home" fora.

Furthermore, the California court system is exceedingly even-handed regarding choice of law, particularly in its consideration of the interests of other jurisdictions. For example, California courts are increasingly more likely to apply the substantive law of the outside jurisdiction than they are to impose California's own substantive law where the issue in dispute involves conduct occurring elsewhere. *See, e.g.*, *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 530 (Cal. 2010) (noting interest of sister states in applying a "rule of law limiting liability for commercial activity conducted within the state in order to provide what the state perceives is fair treatment to, and an appropriate incentive for, business enterprises"); *Sullivan v. Oracle Corp.*, 254 P.3d 237, 249 (Cal. 2011) (rejecting application of California law to claims by nonresidents for work performed outside the state for a California defendant). Indeed, commentators have noted that recent California cases have moved to a distinctly territorial approach to choice of law and that California courts are far more likely to apply foreign law where the operative events occurred outside the State. *See, e.g.*, Michael H. Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS U. L. REV. 167, 169 (2015) ("In 2010 and 2011, the Supreme Court of California unanimously decided two conflicts cases. In holding that foreign law applied in both cases, the court relied heavily on the fact that events giving rise to the claims occurred outside California's territory.") (footnotes omitted; citing *McCann* and *Sullivan*).

*Amicus* GSK's complaints to the contrary, at 20, rely on out-of-date cases and are not reflective of the current state of California law. Indeed, if anything, California courts are being especially solicitous to the pro-business policies of its sister States. Even defense lawyers have acknowledged that the *McCann* and *Sullivan* decisions reflect a pro-business turn by an increasingly conservative California Supreme Court. *See* Hoffheimer, 67 RUTGERS U. L. REV. at 169-70 n. 15 (citing commentary by defense lawyers describing those cases as " 'critical opinions that together provide a framework that can help national companies with California litigation to apply tort reform provisions from a more business-friendly state like Florida, Texas, or Ohio, in which the injury on trial occurred. This doctrine has the potential to dramatically reduce the scope of damages and liability when a claim tried in California arises from an injury that took place in such a state.' ") (citation omitted). Another defense-bar commentator concluded that the *McCann* decision should " 'limit forum shopping and prevent California from becoming a litigation magnet for plaintiffs who seek to sue for injuries that might otherwise be time[]barred.' " *Id.* (citation omitted).

Reviewing the recent California Supreme Court decisions, as well as subsequent decisions applying them, Professor Hoffheimer has concluded that "California courts since 2000 have employed territorial principles to identify state interests in a way that signals a decisive turn away from the state's longstanding commitment to the comparative impairment methodology." *Id.* at 170-71. "[A]ll the recent California cases present disputes between par-

ties from different states; accordingly, the application of a territorial rule can be seen as expressing a de facto adoption of the approach that prevails in some other jurisdictions of applying the law of the place of the wrong as the default rule in disputes between persons who do not share a common domicile." *Id.* at 220-21.

California's more recent "judicial expressions of sympathy for 'business friendly' foreign laws in a pattern of decisions favoring corporate defendants," *id.* (footnote omitted), open it to criticism that is precisely opposite the criticism leveled by Petitioner and its *amici*. Professor Hoffheimer acknowledges the possibility that California has now swung around to a pro-business, rather than pro-plaintiff, perspective:

> The territorial turn may reflect a shifting attitude towards the content of the laws in conflict and a response to the perception that the judicial environment in California is hostile to business.[] The single factor that appears most strongly correlated to the outcome of decisions since 2000 is whether the chosen law favors commercial defendants.[] * * * Selecting law that is good for business may be good for business, but it threatens to convert California choice of law into a form of better law that leaves the court's rationalizations open to a charge of systematic bias in favor of a class of parties.

*Id.* at 222-23 (footnotes omitted); *see also id.* at 222 n. 254 ("with the exception of the prospective application of *Kearney v. Saloman Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006), apparently no California deci-

sions have rejected defenses when the conduct occurred in a foreign state and that place's law provided a defense. In every case since 2000 where it has arguably departed from the traditional approach, it has done so by applying business-friendly law that favored defendants.").

Where each side contends that the courts are favoring the other, it is a safe bet that they are doing something right, and more than likely are not infected by systematic bias.

As for various of the other complaints regarding the fairness of litigating national mass-tort suits, none poses any meaningful due-process problem. Any difficulty in obtaining live trial testimony from out-of-state witnesses, GSK *Amicus* Br. at 16-17, is an inevitable issue in any mass-tort litigation and is hardly unique to California. It would be equally true in Petitioner's home fora or other favored consolidated venue and has nothing to do with personal jurisdiction issues. Indeed, all parties agree that mass-tort plaintiffs, regardless of their residency, could sue a defendant in its State of incorporation or where it has a principal place of business. Yet those venues have no more ability to compel live trial testimony of out-of-state treating physicians than does California.[3]

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[3] The only thing that would cure this issue would be to require plaintiffs to sue in their home State. But that, of course, would make it similarly difficult to compel trial testimony of various witnesses with knowledge of *defendant's* conduct, might still raise choice-of-law issues if defendant's underlying decisions or manufacturing occurred at its corporate headquarters or elsewhere, and would guarantee the diffusion of claims across 50 venues, thus making them less economically viable and subject to pressure to settle on the cheap.

That such practical concerns do not track personal jurisdiction over the *defendant* demonstrates that they are a separate problem from the issues in this case. GSK thus is mixing apples and oranges – convenience issues have nothing to do with jurisdiction unless they rise to the level of fundamental unfairness that cannot be cured by other means, such as existing rules on *forum non conveniens*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); Pet. App. 38a n. 5, or by alternative procedural remedies.[4] If the response to such problems in any individual case is patently unfair to a defendant, then it constitutes its own separate due-process problem, not a problem with personal jurisdiction.

*Amicus* GSK makes the particularly dubious claim, at 4, that "aggregating large numbers of plaintiffs makes it difficult if not impossible for defendants to defend each claim on its merits." That claim gets it precisely backwards. Aggregating plaintiffs and then dealing collectively with the common legal parts of their claims – was the product defective, what did defendant know and when did it know it, did it market its product in a misleading manner – leaves all the more time to address the individual aspects of each plaintiff's claims. If such suits were brought either

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[4] GSK's objection, at 19 n. 9, that *forum non conveniens* is inadequate because it is discretionary misses the point. Due process only provides a minimum guarantee of fundamental fairness, not a defendant's most preferred form of process. *Forum non conveniens should* be discretionary given that balancing relative convenience is not a science and admits to a wide range of acceptable outcomes. It is only where such discretion is abused that it might rise to the level of fundamental unfairness implicating a due-process problem.

individually or collectively across 50 state fora, GSK and other defendants would spend considerable time re-litigating identical common issues and just as much time per plaintiff litigating individual issues. The aggregate amount of time GSK would spend would be far higher in total, ad it would be far more difficult and expensive to devote time to individual issues.

GSK's further complaint, at 13-14, about the number of non-resident plaintiffs suing in California is hyperbole and relies on highly questionable data. Neither GSK nor the source it cites describes how many of the *defendants* are "at home" in California, and hence the residence of plaintiffs alone is meaningless. In this case, for example, defendant McKesson is being sued by numerous non-resident plaintiffs yet is it frivolous to claim that such fact somehow reflects a problem with personal jurisdiction.[5]

*Amicus* DRI's denigration of the California court system as a "Judicial Hellhole[]," DRI *Amicus* Br. at 11, likewise lacks substance. Suffice it to say that such *ad hominem* attacks on California and other state courts add nothing to the debate and, ironically

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[5] The source cited by GSK's claim is a supposed study of California suits, but links only to the Executive Summary, with no apparent means to access the complete report or its methodology. *See Executive Summary: Are Out of State Plaintiffs Clogging California Courts?*, Civil Justice Association of California (2016), http://cjac.org/what/research/CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf (viewed April 7, 2017). Such questionable data is not a credible basis for decision-making by anybody, much less a proper basis for this Court to weigh in on policy issues.

do not even distinguish California from Petitioner's principal places of business – New York and New Jersey – which are likewise disparaged by DRI's intemperate source. *See* American Tort Reform Foundation, *Judicial Hellholes*, http://www.judicialhellholes.org (viewed April 7, 2017) (ranking New York City and New Jersey in the top five, along with California).

* * * * *

In the end, none of the complaints by Petitioner or its *amici* reflect anything approaching fundamental unfairness. The Due Process Clause is a narrow constitutional constraint on state authority that, like other due-process constraints, should be applied sparingly and humbly, without reference to the debatable policy concerns raised by Petitioner and its *amici*. Such concerns over how best to deal with nation-wide mass torts are properly addressed to the States themselves or, if necessary, to Congress to establish uniform national rules covering the procedures for dealing with injuries arising from nationwide commerce. Having this Court constitutionalize all the nuances of the clash between businesses and consumers would, "to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. As with many issues, there is an ongoing debate and experimentation regarding how best to balance the conflicting interests of businesses and consumers when it comes to mass torts. It is more than appropriate to allow that debate and experimentation "to continue, as it should in a democratic society." *Id.* at 735.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the California Supreme Court.

Respectfully submitted,

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RECORDS AND BRIEFS

FILED
APR - 5 2017

No. 16-466

# In the Supreme Court of the United States

BRISTOL-MEYERS SQUIBB COMPANY,

*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISO, ET AL.,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of California**

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## INTEREST OF AMICUS CURIAE

This Amicus brief is submitted on behalf of The Center for Auto Safety (CAS)[1] in support of the Respondents. The issue raised in this appeal has significant jurisprudential implications for every American consumer who purchases and uses products distributed nation-wide by foreign corporations.

CAS was established in 1970 by Ralph Nader and the Consumers Union and it is an outgrowth of the "Corvair" scandal. After that ordeal, "Nader realized that his singlehanded, sporadic monitoring of the auto industry would be ineffective." Thus, he and the union created the CAS as an independent (but affiliated) organization "to keep a sharp eye on the National Highway Safety Bureau" (Acton and LeMond, Ralph Nader: A Man and a Movement, p. 69, 1972) by lobbying, researching, and litigating as necessary. Today, the CAS is independent of both Nader and the Consumers Union, but certain residues of that affiliation remain. However, the Center for Auto Safety's original goals remain: to work for improved vehicle highway safety, reliability, and economy. While these basic tenets reflect its founders' original purposes, the CAS itself has grown tremendously. Operating

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing; letters of consent have been lodged with the Court.

with more than 10,000 members and benefiting from public and private contributions, along with the sale of its published research, the CAS employs a small staff. CAS is a nonprofit research and advocacy organization to provide a public voice for auto safety. Our mission is to improve the safety, efficiency reliability and cost to the consumer of vehicles, which explicitly demands that we do what we can to help reduce motor vehicle deaths, injuries and crashes. These goals often cause the CAS to furnish testimony before Congressional oversight committees and sponsor independent analysis of pending safety legislation, government safety regulations and public health issues arising because of mistakes in the marketing of unsafe vehicles. To this end, the CAS has also been involved in a number of lawsuits, challenging decisions of the Secretary of Transportation and the National Highway Traffic Safety Administration (NHTSA). Examples of the Center for Automotive Safety's public health advocacy include: *Center for Auto Safety v. National Highway Safety Admin.* 793 F.2d 1322 (1986), in which the CAS challenged an administrative rule involving fuel economy; *Center for Auto Safety v. Lewis*, 685 F.2d 656 (1982), asking a federal court to examine the Secretary of Transportation's settlement "of a safety investigation concerning 23 million Ford vehicles"; and, *Center For Auto Safety v. Volkswagen AG, et al.,* Case No. 1:15 CV-1356 (U.S. D.C. E.D.VA. 2015) seeking injunctive relief against these car companies for defrauding consumers by manipulating EPA tests intended to restrict vehicle emissions.

In addition to its direct sponsorship activity, the CAS occasionally participates as an *amicus curiae*

when the issue relates directly to the relationship between vehicle safety, consumer protection and the role of the civil justice system in facilitating these goals. It is for these reasons that the CAS has prepared this *Amicus* Brief. The CAS appears as *Amicus* to explain the importance of preserving a broad definitional predicate for specific jurisdiction so that every American consumer has available to him or her the civil justice system in the state of their residents and, if so desired, alternatively in another state where the defendant's product is marketed to seek fair compensation for the serial /national marketing of an unsafely designed or manufactured product. If the Court were to adopt the radically revised definition of specific jurisdiction proposed by the Petitioner and its Amici, it would limit an injured party's access to courts by only permitting suits in a forum where the following circumstances coalesce: (1) the forum is the state in which the product was originally released into the stream of commerce and (2) where the plaintiff was harmed. Limiting specific jurisdiction in this fashion would undoubtedly fly in the face of how products such as motor vehicles and pharmaceutical drugs are marketed and used across the country. It would also elevate form over substance by ignoring the fact that products like motor vehicles and drugs like Paxil are designed, manufactured and marketed for sale in every state in the United States using the exact same plans and practices. And, every major product manufacturer expects—and in fact hopes—that its product will be used or consumed by as many Americans as possible. Thus, limiting access to the civil justice system in the manner argued by the

Petitioner and its Amici would essentially ignore our modern product delivery system.

Further, the outcome argued by the Petitioner and its Amici would, if followed to its logical conclusion, bestow upon corporations unfair control over the venue where they can be haled into court. If the Court adopts the rule that a product manufacturer/distributor can only be sued via specific jurisdiction in the state where the harm occurred and the product was originally distributed, a huge change in the marketing of products will arise and the civil justice system may be substantially altered. Manufacturers will then have the option to release their products into the stream of commerce in the least populated states and then use a third-party distribution network to deliver their products across the United States. Doing so will significantly change the face of the civil justice system. Restricting jurisdiction to states in which the injury and the distribution of the product coalesce could in fact limit injured consumers to filing in the defendant's home state. Such a restrictive ruling will undoubtedly and needlessly cause a huge burden on the public and substantively alter access to our civil justice system.

## STATEMENT OF THE CASE

Your Amicus accepts and incorporates here the Statement of the Case submitted by the Respondent.

## SUMMARY OF ARGUMENT

In the context of this products liability case, there is a vast difference between the Petitioner's legal complaint about the ruling below and the remedy it seeks, including a significant reworking of this Honorable Court's definitional scope of specific jurisdiction. It is your Amicus' position that the decision below was warranted; however, even if the Court should find fault with the analysis below, there is no need to redefine the scope of specific jurisdiction to include limitations which will significantly alter every American's access to the civil justice system.

In the Supreme Court of California, the Majority found that because Bristol-Myers Squibb pursued the exact same allegedly negligent and misleading marketing practices in-state and out-of-state in the sale of Plavix pills and, as a result of the use of Plavix, both in-state and out-of-state plaintiffs suffered similar adverse consequences, the defendant was subject to specific jurisdiction. In other words, the California court found a substantial nexus between all of the plaintiffs' claims and the in-state marketing practices of Bristol-Myers Squibb, thereby allowing for personal jurisdiction of these claims, regardless of the state of residence of the Plaintiffs. The Court below reasonably found that the defendant's contacts with the forum were undoubtedly sufficient that it should have foreseen or "reasonably anticipate[d] being haled into court here." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980).

The Petitioner and its Amici challenge the ruling below on the basis that Bristol-Myers Squibb's alleged wrongdoing was not related to, nor did it arise out of misconduct in California that harmed the out-of-state plaintiffs. Stated otherwise, the argument is that since the out-of-state plaintiffs ingested and suffered injury outside of California and because the defendant marketed Plavix to these plaintiffs outside of California, there is no nexus with California and, therefore, specific jurisdiction cannot obtain. This argument asks the Court to erect a territorial shield that artificially and inconsistently acknowledges that California courts have specific jurisdiction over the defendant in California for Californians, but not for out-of-state plaintiffs. That argument contorts the principle that specific jurisdiction is predicated upon a defendant's presence in the forum state and not the plaintiffs. Likewise, this argument is inconsistent with "modern transportation and communications" which have lessened the burden of a defendant being sued in the venues where they conduct business. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

The Petitioner and its Amici ask this Honorable Court to find that unless a plaintiff's harm/claim arises out of or relates to a defendant's in-state conduct via marketing and/or distribution of the product which caused the plaintiff's harm in-state, a court cannot obtain specific jurisdiction over the out-of-state defendant—despite the defendants huge marketing efforts and derived in-state profits. With all due respect, if the Court adopts this highly restrictive definitional basis upon which specific jurisdiction must lie, it will have, in effect, turned its back on the marketing practices which flourish in this

country; and, a restrictive ruling of this nature will effectively close the court house doors to thousands of American consumers who suffer injury every year because of the distribution of carelessly or defectively manufactured products.

In an age of nationwide marketing practices by U.S. and foreign international conglomerates, singularly restricting jurisdiction over out-of-state company to a forum which satisfies two criteria—*i.e.*, where the product was first placed into the stream of commerce and the injury occurred—ignores the distribution practices which allow Americans to enjoy nationwide product marketing and the portability of most consumer products, which offer huge profits to national and international companies. Restricting specific jurisdiction in this fashion would literally close the courthouse doors to hundreds of thousands of Americans who rely on the civil justice system to rectify harm caused by poorly designed or manufactured products intentionally placed in the stream of commerce with specific intent to sell them across all state lines.

Despite the array of nationwide marketing schemes employed by domestic and foreign business entities to market and distribute their products to every corner of this great country, the Petitioner seeks a ruling to restrict every type of legal controversy (contract or tort) to the state in which the initiating action coincides with the resulting harm. The Respondent argues that due process can only be secured by restricting lawsuits to the forum where a non-resident defendant is "at home" or the forum where the foreign defendant purposefully released the product into the stream of commerce (*e.g.*, marketing

its product) and the harm occurred—despite an out-of-state defendant's extensive in-state marketing practices and a nationwide distribution plan that caused the product to be used in the forum state. This is an extremely dangerous, self-serving jurisdictional argument.

Whether intended or unintended by their arguments before this Honorable Court, the reality is that the Petitioner and its Amici are not just asking to restrict specific jurisdiction to those cases involving in-state marketing of a product causing harm in that state, but also for a reconstitution of definitional jurisdiction, which will effectively and dramatically shorten the fair reach of the civil justice system. Exercising specific jurisdiction over an out-of-state party, which has purposefully acted to distribute its products in-state, is essential to allow every American the opportunity to access the civil justice system when harm befalls them.

## ARGUMENT

### I. THE CALIFORNIA SUPREME COURT ADHERED TO THE TENETS OF DUE PROCESS AND PROPERLY ALLOWED FOR SPECIFIC JURISDICTION OVER THE DEFENDANT

There is no doubt that California courts have specific jurisdiction over the defendant to litigate the *California plaintiffs'* claims that Bristol-Myers Squibb tortuously marketed Paxil—as an allegedly defective product—which led to injuries to Californians. In fact,

no one disputes this conclusion because Bristol-Myers Squibb released Paxil into the stream of commerce, it floated throughout the state of California and it harmed Californians. Instead, the issue here is whether out-of-state plaintiffs may join in the California based lawsuit against the defendant when these consumers allege that they were harmed in the same manner and as the result of the same tortious conduct, but their harm arose in a different state?

The decisions of this Court counsel that specific jurisdiction is dependent upon the defendant's conduct and connections with the forum State. Specific jurisdiction has never been predicated upon the forum state residency of the Plaintiffs. Emphasizing the obvious distinctions that must be drawn between Due Process analysis and the natural inclination that every forum state will have to provide a convenient forum to redress injuries, Mr. Justice Brennan emphasized that:

> . . . the constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State. [citation omitted] Although it has been argued that foreseeability of causing injury in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a "sufficient bench-mark" for exercising personal jurisdiction. [citation omitted] Instead, "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with

> the forum State are such that he should reasonably anticipate being haled into court there."

*Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985).

Critical and controlling the resolution of whether a court may obtain specific jurisdiction is not the site of harm but rather " . . . it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp., supra.*, 471 U.S. at 474-475, citing *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

So long as a foreign defendant has more than minimal contacts within the forum State, the issue is not whether or not Due Process has been satisfied, but instead it's a question of whether the assertion of personal jurisdiction would comport with "fair play and substantial Justice." *International Shoe Co. v. Washington.* 326 U.S. 310, 320 (1945). This very issue was addressed by the Court in *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 779-781 (1984), when it decided that the forum state (New Hampshire) had specific jurisdiction over the foreign defendant in a libel action brought for harm suffered by a New York plaintiff because of false publications distributed throughout the United States. Addressing the notion that the Plaintiff was not a resident of the forum and that the subject matter was minimally related to the forum, the Court ruled:

> Finally, implicit in the Court of Appeals' analysis of New Hampshire's interest is an

emphasis on the extremely limited contacts of the plaintiff with New Hampshire. But we have not to date required a plaintiff to have "minimum contacts" with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking. In *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952), none of the parties was a resident of the forum State; indeed, neither the plaintiff nor the subject matter of his action had any relation to that State. Jurisdiction was based solely on the fact that the defendant corporation had been carrying on in the forum "a continuous and systematic, but limited, part of its general business." *Id.*, at 438. In the instant case, respondent's activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities. But respondent is carrying on a "part of its general business" in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire.

The plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry. As noted, that inquiry focuses on the relations among the defendant, the forum, and the litigation. Plaintiff's residence may well play an important role in deter-

> mining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum. Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises. *See Calder v. Jones*, post, at 788-789; *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). But plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts.

Instead, once it is determined that a foreign defendant has the requisite minimum contacts with the forum, the court must decide "whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Burger King Corp.*, 471 U.S. at 476. That determination then calls into play the plaintiffs' interests, the burden on the defendant, the efficiency of resolving the controversies and the shared interests of several States in providing substantive relief. *Burger King Corp.*, 471 U.S. at 477.

In *McIntyre Machinery America, Ltd. v. Nicastro*, 564 U.S. 873 (2011), Justice Breyer observed in his concurring opinion that the holding of the New Jersey Supreme Court—which was overturned by the issuance of a plurality opinion—finding specific jurisdiction without more than evidence of injury and the distribution of just one of defendant's products in New Jersey was incorrect. Essentially, the Court ruled that without sufficient contacts with the forum

state beyond the marketing of one of its products and an injury, a court did not have a due process basis for jurisdiction. Following that logic here, the opposite is true. Bristol-Myers Squibb has in the past and continues to enjoy the benefit of the substantial and continuous marketing of Plavix in California. Undoubtedly, and incontrovertibly the defendant had to have foreseen it was subject to suit in California. And, for that reason alone, the Due Process test of specific jurisdiction was met and the Court below was correct in affirming the ruling of the trial court.

## II. SPECIFIC JURISDICTION PROPERLY LIES AGAINST A FOREIGN DEFENDANT WHEN IT MARKETS ITS PRODUCTS IN A SUBSTANTIAL AND CONTINUOUS MANNER IN THE FORUM AND THE GRAVAMEN OF THE CLAIM RELATES TO THE SAME PRODUCT, REGARDLESS OF THE FORUM OF THE INJURY OR THE FORUM WHERE THE PRODUCT WAS ORIGINALLY RELEASED INTO THE STREAM OF COMMERCE.

The Petitioner and its Amici have argued that the Court should redefine specific jurisdiction so that a forum court may only exercise its authority to decide a case involving a foreign defendant, despite clear and convincing evidence that it purposefully and substantially distributes its products in the forum, if the court also concurrently finds that the harm was suffered in the forum and the specific product causing the harm was marketed in the forum. As set forth below, your Amicus respectfully submits that neither principles of Due Process nor the policy arguments raised by the Petitioner's Amici justify the shrinkage of the authority of courts of general juris-

diction to serve as arbiters of legitimate claims against foreign defendants which should reasonably expect to be subject to a forum State's civil justice system.

### A. The Policy Arguments Raised by the Petitioner's Amici Are Unsuitable to a Principled and Reliable Definition of Specific Jurisdiction.

For decades, the Court has stressed that Due Process allows a nonresident defendant to be subjected to the jurisdiction of the forum state when the defendant evidences certain minimum contacts so that the suit does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)). The facts supportive of fair play and substantial justice warranting specific jurisdiction have always related to the activities the "defendant himself" created with the forum. *Walden v. Fiore,* 134 S. Ct. 1115, 1122 (2014). It is the "defendant-focused" minimum contacts rather than the contacts between the plaintiffs or third parties and the forum that tests the boundaries of Due Process. *Id.* The jurisdictional test of foreseeability embraced by the Court provides that the foreign defendant's contacts with the forum be sufficiently substantial and continuous so that the defendant can anticipate that he or she is subject to suit in the forum. These principles have appropriately caused the Court to find that " . . . mere injury to a forum resident is not a sufficient connection to the forum". *Calder v. Jones,* 465 U.S. 783, 788-789 (1984). Rather, the focus has been and must remain on the non-

resident defendant's contacts with the forum state rather than with " . . . persons who reside there." *Walden*, 134 S. Ct. at 1122.

When the underlying controversy is shown to have an *"affiliation"* between the forum and the underlying controversy, and the controversy relates to the defendant's activities (which are continuous and substantial), the defendant will be and should be subject to the specific jurisdiction of the forum. *Walden, Id.*; *Goodyear Dunlop Tires Operations, S.A. Brown,* 564 U.S. 915, 919 (2011). It has, until now, been the view that the *"affiliation"* requirement pertains to the defendant's activity in the forum *or* an occurrence in the forum, justifying a State's regulation of the defendant's activities. *Id.*

> Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to specific jurisdiction. See, *e.g., World-Wide Volkswagen*, 444 U.S., at 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (where "the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others" (emphasis added)).

*Goodyear Dunlop Tires Operations, S.A., supra.*, 564 U.S. at 927.

What is critical to jurisdictional analysis is the nature of the contacts between the defendant and the forum, and whether the underlying controversy relates to or arises out of the defendant's forum activities. *Burger King Corp., supra.* 471 U.S. at 476-477. And here, there is little dispute that the controversy—a products liability claim—relates to the negligent marketing of Plavix as a defective product. The record below clearly showed the distribution of the same product and the use of the same marketing practices in virtually every state in which a plaintiff resided. Undoubtedly, therefore, a rational affiliation existed and it was quite predictable that Bristol-Meyers Squibb would be subject to litigation in California.[2]

Despite the rational and appropriate predicate for obtaining specific jurisdiction and deciding that fairness abounds in litigating all the plaintiffs' virtually identical claims in California, the Petitioner and its Amici ask that the decision of the California Supreme Court be reversed—claiming that absent proof that each plaintiff suffered harm in the forum State,

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[2] In *Helicopteros Nacionales De Colombia v. Hall,* 466 U.S. 408, 411, n. 10 (1984) the Court mentioned but did not address the jurisdictional meaning of the phrases "arising out of" and "related to" the defendant's forum contacts. In fact, the Court queried whether or not these two phrases describe different connections, or what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists, or if there is a difference between these two phrases how it effects a challenge to specific jurisdiction. Fortunately, there is no need to decide this thorny issue because the present controversy clearly "relates to" the same marketing of Plavix which is claimed to have been done negligently and/or in a defective manner across the United States.

California cannot hale the defendant into court. While articulated slightly differently, each of the Petitioner's Amici make these arguments:

- A court should not exercise specific personal jurisdiction over a defendant with respect to claims of nonresident plaintiffs that did not arise out of acts or injuries within the forum State. [Amicus Brief of United States, p.11]
- Principles of "fair play and substantial justice" should prevent a forum State from hearing the claims of out-of-state plaintiffs even when the very same alleged wrongful conduct has caused similar harm to plaintiffs within the forum. [Amicus Brief of U.S., p. 13]
- The California Supreme Court's decision that the same in-state and out-of-state conduct established a substantial affiliation is an unwarranted extension of jurisdictional authority, because it reduces the ability of businesses to predict the jurisdictional consequences of their activities. *Id.*
- Allowing a forum State to hear cases brought by a non-resident plaintiff—despite the fact that the defendant's same business activities were substantial and continuous in the forum and in Plaintiff's home state—would impair trade interests on the part of foreign companies. [Amicus Brief of U.S., p. 14]
- Allowing an injured non-resident plaintiff to file an action against a manufacturer that distributes the same (allegedly) defective product in the forum and elsewhere would

impermissibly sever the connection due process requires between the place of the defendant's conduct and the place where it may be sued for that conduct. [Amicus Brief, Product Liability Advisory Counsel, p. 2 and Amicus Brief of the Chamber of Commerce, p.3]

- Unless the defendant's in-forum conduct is the proximate cause of the plaintiff's injury or loss in the forum, there is no grounds for specific jurisdiction; absent "suit related conduct" a defendant cannot be sued in the forum state. [Amicus Brief, Product Liability Advisory Counsel, p. 7; Amicus Brief, Chamber of Commerce, p. 5]

Each of these arguments ask the Court to turn on its head the following principled statement: "[w]e have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum state". *Walden, supra.* 134 S. Ct. at 1122. The Amici argue that jurisdiction can only be obtained upon proof that the defendant's in-state conduct caused harm to the plaintiff in the same state. If the Court accepts the Petitioner and its Amici's arguments, then it will foster disastrous results for the American consumer. Here are just three examples of the untoward results of the establishment of such a narrow and unreasonable definition of specific jurisdiction:

1. In the instant case it would mean that a California resident who bought the product in California, but then moved to Florida and suffered injury in Florida from the product

could not sue in California or Florida. Why? Because the Petitioner and its Amici would require the coalescence of "suit related conduct"—defined as the defendant's activities and the injury—in the same forum to obtain jurisdiction.

2. If a consumer purchased a used car in New Jersey and suffered injury in New Jersey because of a defect in the car, but it turned out that the car was sold as a new product by the defendant manufacturer in Ohio, according to the Petitioner's Amici the consumer would not be able to obtain jurisdiction over the manufacturer in New Jersey—because the defendant released the product for sale in Ohio.

3. If an allegedly defective motor manufactured by a foreign defendant is imported and marketed in the forum state by its wholly owned U.S. subsidiary, specific jurisdiction is not obtained for a breach of warranty, even though the warranties are shown to have been written by the parent corporation for delivery in the forum state. Specific jurisdiction is not obtained absent proof that the foreign defendant either intended to sell the product in the forum or that the subsidiary was the parents alter ego.[3]

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[3] *Williams v. Yamaha Motor Co.*, 2017 U.S. App. LEXIS 5210 (9th Cir. 2017). While the appellate court did not mention the actions of YMC in preparing the warranties, these "related to" activities were carried out by YMC. *See* the Yamaha Owners Manual confirming it was written by the foreign manufacturer

The end result of this proposed narrow and unreasonable restriction upon courts of general jurisdiction will be that thousands and thousands of consumers will be denied access to the courts in their home state or another state where the manufacturer provides a significant distributive market. And, if a consumer wants to sue a manufacturer, he or she will be forced to file suit in the manufacturer's home state. Undoubtedly, the product manufacturers of the world will welcome this outcome because it will further deter lawsuits and it will allow manufacturers to choose a state of incorporation with the least favorable substantive law for the victims of their defective products.[4]

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and intended to be delivered to California buyers: www.yamaha-motor.com/assets/service/manuals/2005/LIT-a8626-05-85_1022.pdf. This holding is alarming because virtually every non-U.S. manufacturer of motor vehicles uses a similar marketing and importation strategy; if this holding represents the limits of specific jurisdiction then millions of Americans may have lost the privilege of seeking redress against foreign auto manufacturers—providing them a distinct advantage over domestic car manufacturers. Further, if this holding is extended to U.S. manufacturers, these companies will argue that if they placed their product in the stream of commerce outside the forum state, that state does not have personal jurisdiction. See, *Tarver v. Ford Motor Co.*, 2016 U.S. Dist. LEXIS 167363 (W.D. Okla. Dec. 5, 2016), rejecting this very argument.

[4] With respect, while the Product Liability Advisory Counsel's Brief castigates the result of this case as promoting "forum shopping", if the Court accepts the Amici's definition of specific jurisdiction, it will allow for significant corporate forum shopping. We foresee that if the Court adopts the rule that injured consumers cannot file an action against a nationally distributed product manufacturer in the plaintiff's home state without evidence that (a) the injury occurred in the forum and

### B. Predictability and Fairness Dictate That Foreign Manufacturers Remain Subject to Specific Jurisdiction When They Have Purposefully Availed Themselves of the Forum's Market Place by Distributing Their Allegedly Defective Products in the Forum Regardless of the Situs of Distribution of the Injury Producing Product or the Situs of the Injury.

We respectfully submit that there is no legal justification to restrict a nationally distributed product manufacturer's obligation to defend its product's safety to (1) its "home state" and (2) the forum where it first placed the product into the national stream of commerce and the injury arose in that same stream (state). Instead, in recognition that specific jurisdiction is founded upon the defendant's conduct and connection with the forum state—which demonstrates predictability that the defendant may be haled into court in the forum—the boundaries of specific jurisdiction should remain welded to evidence that depositing a product into the stream of commerce will result in the intentional distribution of the product in the forum. *World-Wide Volkswagen Corp., supra.*, 444 U.S. at 297-298.

Stated more simply, the formula for specific jurisdiction should begin with the "denominator",

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(b) *the* injury producing product was released by the defendant in the forum, it will require many consumers to file suit in the defendant's home state. That result will allow manufacturers to engage in massive corporate forum shopping by shifting their original state of distribution to one with the most favorable tort reform law and to reincorporate to a home state with substantive laws more favorable to defendants.

which is defined as proof that the corporate defendant has purposefully availed itself of the privilege of marketing its products in the forum State in a regular and continuous fashion. Once the denominator is established (*i.e.*, "the regular and anticipated flow of products from the manufacture to distribution to retail sale": *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 112, 115, 107 S. Ct. 1026, 1034 (1987) (Brennan, J., concurring in part and concurring in judgment), then the fairness elements should factor into the nominator—to justify a forum court accepting jurisdiction.). The numerating factors should continue to include but not be limited to any one of these facts: (1) the similarity of the gravamen of the forum controversy and the claim raised by any out-of-state plaintiff, or (2) the relationship between the injured plaintiff's claim and the defendant's activities in the forum, or (3) the affiliation or similarity of the marketing of the product in the forum state and other states, or (4) the foreseeability that the distribution of the product in one state will lead to its use and injury in another state (*e.g.*, the marketing volume of the product and the defendant's distribution practices, the portability of the product, or the awareness that the product may cause harm.) *Book v. Voma Tire Corp.*, 860 N.W. 2d 576 (Iowa 2015) (relying upon precedent from this Honorable Court.)

Fairness must remain the crux of the minimum contacts analysis. Is it unfair to compel a manufacturer selling thousands and thousands of products nationwide to defend its allegedly unsafe design in a state where its product was sold—regardless of the state in which the injury occurred—or in a state

where its product was used and injury occurred—regardless of where the product was released into the stream of commerce? We think not and we ask the Court to both affirm the decision below and announce a definition of specific jurisdiction which accounts for the marketing practices of product manufacturers in the United States.

## CONCLUSION

The judgment of the California Supreme Court should be affirmed and the Court should further clarify the factors essential to finding specific jurisdiction.

Respectfully submitted,

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APRIL 5, 2017

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No. 16-466

# In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, et al.,

*Respondents*.

**On Writ of Certiorari to the Supreme Court of California**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, AMERICAN TORT REFORM ASSOCIATION, AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, AMERICAN TORT REFORM ASSOCIATION, AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

## INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, and has participated as *amicus curiae* in numerous cases addressing jurisdictional issues.[1]

Many Chamber members conduct business in States other than their State of incorporation and State of principal place of business—*i.e.*, the forums in which they are subject to general personal jurisdiction, see *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 760 (2014). They therefore have a substantial inter-

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' blanket letters of consent to the filing of *amicus* briefs have been filed with the Clerk's office.

est in the rules governing the extent to which a State can subject nonresident corporations to specific personal jurisdiction.

The California Chamber of Commerce ("CalChamber") is a nonprofit business association with over 14,000 members, both individual and corporate, representing virtually every economic interest in the State. For over 125 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues.

Founded in 1986, American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus* briefs in cases that have addressed important liability issues.

The Civil Justice Association of California ("CJAC") is a non-profit organization of businesses, professional associations and financial institutions dedicated to educating the public about ways to make our civil liability laws more fair, economical, and certain. Toward this end, CJAC regularly petitions government for redress when it comes to determining who pays, how much, and to whom when the conduct of some occasions harm to others.

CJAC's efforts include participation as *amicus curiae* in cases raising a variety of liability issues.

Subjecting corporations to specific jurisdiction for claims that have nothing to do with the forum State would eviscerate the due process limits on personal jurisdiction recognized by this Court in numerous cases dating back to *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945)—and could well expose corporations that do business nationwide to what effectively amounts to general personal jurisdiction in all fifty States.

*Amici* file this brief to explain that the holding below is irreconcilable with this Court's precedents and that the California Supreme Court's expansive approach to specific jurisdiction would impose unfair burdens on businesses and encourage forum-shopping that undermines the integrity of the judicial system.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has recognized several times in recent years that "'specific jurisdiction has become the centerpiece of modern [personal] jurisdiction theory, while general jurisdiction [has played] a reduced role.'" *Daimler*, 134 S. Ct. at 755 (quoting *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 925 (2011)). The Court's decision in *Daimler*, reaffirming the limited availability of general jurisdiction, heightened the focus on standards governing specific jurisdiction.

Some lower courts have responded by stretching specific jurisdiction far beyond the bounds established by this Court's precedents, applying the "specific jurisdiction" label to what is in effect a new form

of general jurisdiction. The ruling below is an example of that phenomenon.

The claims of the 575 out-of-State plaintiffs in this case have no connection to California—the drug at issue (Plavix) was not manufactured there, the plaintiffs did not buy it there, the plaintiffs were not injured there; put simply, absolutely nothing relevant to those claims happened in California. Unquestionably, if the out-of-State plaintiffs' claims had been filed individually, or as a mass action that did not include California plaintiffs, due process principles would bar California from asserting personal jurisdiction over petitioner.

But the California Supreme Court majority concluded that subjecting petitioner to suit in California on those claims would not violate due process, based on two factors: (1) the majority's conclusion that petitioner's contacts with California were part of its nationwide marketing and sales efforts, which also involved separate, but similar, contacts with the States of the non-California plaintiffs—and that the California contacts were for that reason sufficiently "suit-related" to the out-of-State claims; and (2) the determination that joinder of the 575 out-of-State claims to the claims of 86 in-State plaintiffs made "reasonable" the assertion of jurisdiction with respect to the out-of-State claims.

That reasoning is bizarre. A defendant's contacts with a forum cannot be deemed "suit-related" when, as here, they are wholly unnecessary to the plaintiff's claim—such that the plaintiff could still prevail on his or her claim if the defendant's contacts with the forum State did not exist. And the addition of in-State plaintiffs cannot magically render "reasonable" the assertion of jurisdiction with respect to other,

separate claims asserted by out-of-State plaintiffs with separate claims.

Moreover, the legal theory created by the majority below has no logical stopping point. If it were correct, out-of-State plaintiffs could outnumber in-State plaintiffs by 50:1 or even 500:1 and still invoke specific jurisdiction. Indeed, it is possible that out-of-State plaintiffs would be able to sue on their own, without joining any in-State plaintiffs, simply by making the allegations of parallel in-State and out-of-State conduct relied upon by the majority below here.

Finally, the lower court's theory is not tied to facts unique to California. It would allow each of the fifty States to exercise personal jurisdiction over a defendant with respect to every claim—tort, contract, or statutory—no matter where the plaintiff resides or was injured or where the conduct occurred. All that is required is that (a) the out-of-State plaintiffs' claims rest in some part on conduct that paralleled the defendant's conduct in the forum State; and (b) at least one forum State resident is willing to file a similar claim.

Not surprisingly, this new form of jurisdiction—much closer in real-world effect to "general" than to "specific"—is squarely inconsistent with the holdings and rationale of this Court's specific jurisdiction decisions.

*First*, this Court holds that specific jurisdiction must be based on purposeful contacts between the defendant and forum State that gave rise to the plaintiff's claim. It is "the defendant's *suit-related* conduct [that] must create a substantial connection with the forum State." *Walden* v. *Fiore*, 134 S. Ct.

1115, 1121 (2014) (emphasis added). This requirement of "relatedness" (*Burnham* v. *Superior Court of Cal., Cty. of Marin*, 495 U.S. 604, 621 (1990)) is necessary to ensure that a defendant is subject to specific jurisdiction in a forum only to the extent that it has engaged in activity there.

The majority below applied a "sliding scale approach to specific jurisdiction," under which "the more wide ranging the defendant's forum contacts, the more readily" the court presumes a "connection between the forum contacts and the claim"—even when no such connection actually exists. Pet. App. 32a (internal quotation marks omitted). But there is no basis in this Court's decisions for allowing a presumption to take the place of a contact by the defendant with the forum that gives rise to the plaintiff's claim.

Indeed, such a presumption is entirely inconsistent with the rationale underlying specific jurisdiction: namely, that it is fair to exercise jurisdiction over a defendant with respect to claims arising out of the defendant's forum contacts because the defendant has submitted to the State's regulation by engaging in that specific activity in the State.

*Second*, by exposing product manufacturers to de facto general jurisdiction wherever their products are sold, the sliding-scale approach would virtually eliminate defendants' ability to predict where they might face litigation, raising companies' costs and burdening interstate commerce. It would open the door to untrammeled forum-shopping, flooding the dockets of plaintiff-friendly "magnet" jurisdictions.

*Third*, the sliding-scale approach conflicts with core federalism principles. Courts in magnet jurisdic-

tions would frequently be adjudicating claims with *no* connection to the forum. The approach would therefore lead to greater interference by forum States in other States' affairs—exactly the opposite of what specific jurisdiction seeks to accomplish.

For all of these reasons, the Court should reaffirm that specific jurisdiction does not apply when the plaintiff's claim arose independent from the defendant's forum contacts, and therefore reverse the decision below.

## ARGUMENT

### Settled Due Process Principles Bar California From Subjecting Petitioner To Personal Jurisdiction With Respect To The Out-Of-State Plaintiffs' Claims.

*International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), holds "that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Goodyear*, 564 U.S. at 923 (quoting *Int'l Shoe*, 326 U.S. at 316).

In applying this standard, the Court has recognized two categories of personal jurisdiction: "general or all-purpose jurisdiction, and specific or case-linked jurisdiction." *Goodyear*, 564 U.S. at 919. General jurisdiction enables a State to adjudicate "any and all claims against" a corporation, because the corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Ibid.*; accord *Daimler*, 134 S. Ct. at 754.

"Specific jurisdiction, on the other hand, depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919; accord *Daimler*, 134 S. Ct. at 754.

In every case in which this Court has upheld an exercise of specific jurisdiction, the defendant's purposeful contacts with the forum State have given rise to the claim to be adjudicated. See *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 479 (1985) (noting that the "franchise dispute grew directly out of" the defendant's activities in Florida); *Calder* v. *Jones*, 465 U.S. 783, 789 (1984) (defendants' actions were "expressly aimed at California"); *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) (claims "ar[o]se[] out of the very activity being conducted" by the defendant in New Hampshire); *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (suit "based on a contract" performed in California); *Int'l Shoe*, 326 U.S. at 320 ("The obligation which [was] here sued upon arose out of th[e] [defendant's] very activities" in Washington).

The majority below expanded specific jurisdiction to encompass situations in which the claim does not arise from the defendant's contacts with the forum—indeed, where the claim arose entirely independent of those contacts. That dramatic expansion of specific jurisdiction is precluded by this Court's precedents and would detach specific jurisdiction from the principles on which it rests. It also would trench on important federalism interests, eliminate defendants' ability to structure their primary conduct to provide some predictability regarding the conduct that may

subject them to suit, and open the door to rampant forum-shopping.

### A. Specific Jurisdiction Is Not Available When The Claim Arose Independent Of The Defendant's Purposeful Contacts With The Forum.

The fundamental due process requirement for exercising specific jurisdiction is a connection between the claim and the defendant's contacts with the forum State. It necessarily follows that specific jurisdiction is *not* available when the plaintiff's claim arose *independently* from the defendant's forum contacts—and that the California court's sliding-scale approach should be rejected.

#### *1. This Court's precedents preclude the exercise of specific jurisdiction when there is no connection between the plaintiff's claim and the defendant's forum contacts.*

Specific jurisdiction requires that "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 134 S. Ct. at 1121. "'[T]he commission of some single or occasional acts of the corporate agent in a state' may sometimes be enough to subject the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity." *Daimler*, 134 S. Ct. at 754 (quoting *Int'l Shoe*, 326 U.S. at 318).

The Court has used the phrase "aris[es] out of or relate[s] to the defendant's contacts with the forum" to describe specific jurisdiction. *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U.S. 408, 414, n. 8 (1984); see also *Walden*, 134 S. Ct. at 1122 ("[T]he relationship must arise out of contacts that

the 'defendant *himself* creates with the forum State.").

The out-of-State plaintiffs' claims do not arise out of petitioner's contacts with California. Pet. App. 5a, 33a-34a (the drug was not manufactured in California, not purchased in California, and these plaintiffs do not have any connection to or suffer injury in California). The question here, therefore, is the extent to which the Court's use of "relates" expands the scope of specific jurisdiction—in particular, whether it extends specific jurisdiction to situations, as here, in which the claim arose completely independent of the defendant's purposeful forum contacts.

The Court has upheld specific jurisdiction only when the claim arose from the defendant's forum contacts (see page 8, *supra*) and rejected it when there was no argument that the claim was in any way related to the forum contacts. See *Burger King*, 471 U.S. at 479-80; *Calder*, 465 U.S. at 789; *Keeton*, 465 U.S. at 780; *McGee*, 355 U.S. at 223; *Int'l Shoe*, 326 U.S. at 320; contra *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 299 (1980); *Kulko* v. *Superior Court*, 436 U.S. 84, 97 (1978); *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958).

Moreover, the Court's consistent justification for specific jurisdiction makes clear that it cannot apply when the claim arose independent of the defendant's forum contacts.

Specific jurisdiction rests on the principle that "the commission of certain 'single or occasional acts' in a State may be sufficient to render a corporation answerable in that State with respect to those acts, though not with respect to matters unrelated to the

forum connections." *Goodyear*, 564 U.S. at 923 (quoting *Int'l Shoe*, 326 U.S. at 318).

"[T]he privilege of conducting activities within a state * * * may give rise to obligations; and, so far as those *obligations arise out of or are connected with the activities within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *Int'l Shoe*, 326 U.S. at 319 (emphasis added).

Applying that reasoning, the *International Shoe* Court concluded that Washington's exercise of specific jurisdiction over the defendant was permissible because the defendant had engaged in activities within the State and "[t]he obligation which is here sued upon arose out of those very activities," making it "reasonable and just * * * to permit the state to enforce *the obligations which [the defendant] ha[d] incurred there.*" *Id.* at 320 (emphasis added).

This Court's subsequent decisions consistently reaffirm that specific jurisdiction is justified because the plaintiff's claim is tied to the defendant's activity in the forum State.

*Burger King* set forth several "reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents": first, "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors"; and, second, "where individuals 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape *having to account in other States for consequences that arise proximately from such activi-*

*ties*." 471 U.S. at 473-474 (emphasis added; citation omitted).

In *J. McIntyre Machinery, Ltd.* v. *Nicastro*, the plurality opinion explained that specific jurisdiction involves a "more limited form of submission to a State's authority" than general jurisdiction, because the defendant subjects itself "to the judicial power of an otherwise foreign sovereign *to the extent that power is exercised in connection with the defendant's activities touching on the State*." 564 U.S. 873, 881 (2011) (emphasis added).

Next, in *Goodyear* (decided on the same day as *Nicastro*), the Court explained that specific jurisdiction "depends on an affiliation between the forum and the underlying controversy, principally, *activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation*." *Goodyear*, 564 U.S. at 919 (emphasis added; brackets and internal quotation marks omitted). It is therefore "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (internal quotation marks omitted).

Specific jurisdiction therefore exists only where a defendant engages in "continuous and systematic" activity in the State "*and that activity gave rise to the episode-in-suit*" (*id.* at 923 (quoting *Int'l Shoe*, 326 U.S. at 317)), or where the defendant commits "'single or occasional acts' in a State [that are] sufficient to render [it] answerable in that State *with respect to those acts, though not with respect to matters unrelated* to the forum connections." *Ibid.* (emphasis added) (quoting *Int'l Shoe*, 326 U.S. at 318).

Most recently, in *Walden*, the Court explained that specific jurisdiction—which it characterized as "case-linked"—"'depends on an "affiliatio[n] between the forum and the underlying controversy'" (i.e., an 'activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation')." *Walden*, 134 S. Ct. at 1121 n.6 (quoting *Goodyear*, 564 U.S. at 919).

The Court's consistent explanations of the principle undergirding specific jurisdiction make clear that a forum State's assertion of this authority is justified by the forum State's legitimate interest in regulating the activity on which the particular plaintiff's claim is based. That rationale is wholly inapplicable when, as here, the plaintiff's claim arose independent of the defendant's forum state activity. In that circumstance, the defendant has done nothing to submit to regulation by the forum State and the fairness rationale that is essential to specific jurisdiction is lacking.

For this reason, numerous lower courts have held that specific jurisdiction is not available where the plaintiff's claim arose independent from the defendant's forum contacts. See, *e.g.*, *Beydoun* v. *Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 508 (6th Cir. 2014); *Consulting Engineers Corp.* v. *Geometric Ltd.*, 561 F.3d 273, 278-79 (4th Cir. 2009); *Oldfield* v. *Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222-23 (11th Cir. 2009); *Menken* v. *Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007); *O'Connor* v. *Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 322 (3d Cir. 2007); *Harlow* v. *Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005); see also *Glater* v. *Eli Lilly & Co.*, 744 F.2d 213, 216 (1st Cir. 1984).

*2. The California court's "sliding scale" standard effectively transforms specific jurisdiction into an amorphous new form of general jurisdiction.*

The novel approach to specific jurisdiction adopted by the majority below is not only precluded by this Court's precedents—it also would greatly expand specific jurisdiction, into a junior form of general jurisdiction, by replacing an objective limitation on specific jurisdiction with an ill-defined "reasonableness" inquiry.

The California court recognized that specific jurisdiction requires (a) purposeful availment by the defendant of the opportunity to do business in California; (b) that the plaintiff's claim arise from or be related to the defendant's purposeful contacts with the forum; and (c) that the exercise of jurisdiction be reasonable. Pet. App. 20a-21a.

With respect to the first two inquiries, the lower court concluded:

- Petitioner "sold Plavix to both the California plaintiffs and the nonresident plaintiffs as part of a common nationwide course of distribution," and petitioner's "nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresident plaintiffs' claims and the company's contacts in California concerning Plavix." Pet. App. 28a.
- "Although there is no claim that Plavix itself was designed and developed in [petitioner's California] facilities, the fact that the company engages in research and product development in these California facilities is relat-

> ed to plaintiffs' claims that [petitioner] engaged in a course of negligent research and design that led to their injuries, even if those claims do not arise out of [petitioner's] research conduct in th[e] state." *Id.* at 29a.

The court labeled an "invalid assumption" the dissent's contention "that [petitioner's] forum contacts must bear some substantive legal relevance to the nonresident plaintiffs' claims." *Id.* at 30a. It held instead that, under its "sliding scale approach" (*id.* at 32a), a plaintiff's claim "need not arise directly from the defendant's forum contacts" or be causally linked to those contacts in any way. *Id.* at 22a. Under that approach, "the more wide ranging the defendant's forum contacts" in general, "the more readily" the court will find a sufficient "connection between the forum contacts and the claim." *Id.* at 32a.

The forum contacts discussed above were "substantially connected to the nonresident plaintiffs' claims" because the contacts were "part of the nationwide marketing and distribution of Plavix, a drug [petitioner] researched and developed, that gave rise to all the plaintiffs' claims." Pet. App. 30a.

The California court then turned to the "reasonableness" inquiry, considering whether California had an interest in adjudicating the out-of-State plaintiffs' claims, whether petitioner would bear a disproportionate burden in defending the out-of-State claims, and whether California should expend its judicial resources on those claims. It held that none of these factors rendered the exercise of jurisdiction unreasonable. Pet. App. 36a, 37a-44a.

This "test" would open the door to extraordinarily expansive specific jurisdiction, for four reasons.

*First*, the approach to finding a sufficient connection between the defendant's forum contacts and the plaintiff's claim is entirely standardless. If the plaintiff's claim need not be dependent in any way on the defendant's forum State activity—and may be totally independent of all of the in-forum activity—"connection" loses all meaning. That is illustrated by the finding below that petitioner's research facilities within California constitute a relevant connection to the State, even though those facilities had nothing to do with the development of the drug in question.

The lower court's acknowledgment that "the more wide-ranging" the contacts, the more readily a sufficient connection will be found, confirms that this analysis has nothing to do with suit-related conduct and instead is a wholly-subjective principle for inflating the scope of specific jurisdiction.

*Second*, the lower court's conclusion here rests principally on its determination that petitioner's alleged in-State conduct paralleled its alleged conduct in other States. Upholding that theory alone would expand specific jurisdiction beyond recognition.

Any out-of-State plaintiff filing suit in California could point to the fact that a product is sold in California—nearly all products sold nationwide are—as a basis for adjudicating disputes over the labeling of the same product when it is sold in other States—on the theory that the defendant's "common nationwide" labeling permits that result. And the same would be true of services offered nationwide.

A defendant would therefore be subject to a variant of general jurisdiction in every State in which they sell their products. Any plaintiff in the country who purchased the product could bring suit in any

State where the product was sold, simply by alleging that the manufacturer's distribution of the product in the forum paralleled its distribution of the product elsewhere.

*Third*, the "sliding scale" approach deprives defendants of the ability to raise the defense of personal jurisdiction with respect to individual plaintiffs.

If suit was brought in California by a lone plaintiff, a Maine resident who alleged that she was injured by taking petitioner's drug in Maine, it is highly unlikely as a practical matter that the California courts would have exercised personal jurisdiction over petitioner (even though the sliding-scale approach theoretically permits that result). But in this case, the court below reached the opposite result because a large number of plaintiffs from inside and outside the State had been gathered together—apparently reasoning that it was more efficient, and therefore "reasonable," to litigate the in-State and out-of-State claims together. Pet. App. 37a-38a.

Procedural rules for joining claims together—whether through mass joinder or the class device—cannot abridge a defendant's due process rights to "present every available defense" to each plaintiff's claims. *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)). Thus, for example, in *Wal-Mart Stores, Inc.* v. *Dukes*, this Court explained that "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." 564 U.S. 338, 367 (2011) (citations omitted) (citing 28 U.S.C. § 2072(b)). And in *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct.

1036, 1050 (2016), the Court acknowledged the "great importance" of the question whether uninjured plaintiffs (who could not presumably sue on their own) could recover in a class action. See also *id.* at 1053 (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.").

These principles—rooted in due process—apply irrespective of whether it is thought to be more "efficient" (Pet. App. 39a) to join claims together in a single lawsuit, or a single forum. Due process calls for the balance between fundamental fairness and efficiency to be struck in favor of the former, not the latter. As this Court has put it in another context, "Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person" whose rights are at stake. *Fuentes* v. *Shevin*, 407 U.S. 67, 92 n.22 (1972); cf. also, *e.g.*, *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency.") (footnote omitted).

Certainly out-of-State plaintiffs have ample forums available in which to bring their claims, including the States in which petitioner is subject to general jurisdiction and those where the alleged injuries occurred. Whatever "efficien[cy]" is gained by allowing them to sue in California is far outweighed by the unfairness of subjecting petitioner to specific jurisdiction on claims that have nothing to do with the State.

*Fourth*, the lower court purported to employ the "reasonableness" requirement as a check on overly-expansive specific jurisdiction. But it concluded broadly that as long as the defendant had to litigate claims of California plaintiffs, there was no basis for holding it unreasonable to add out-of-State plaintiffs' claims. The "reasonableness" check is therefore no limitation at all.

Indeed, while this case involves both in-State and out-of-State plaintiffs, nothing in the sliding-scale approach requires there to be any in-State plaintiffs *at all*, as long as the defendant has engaged in conduct in the State that parallels the out-of-State conduct that allegedly caused an out-of-State injury. Permitting suits to be brought on a specific jurisdiction theory—even when *all* (or nearly all) of the plaintiffs are out-of-State and have claims based on out-of-State conduct in effect "reintroduce[s] general jurisdiction by another name"—and on a massive scale. Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 Lewis & Clark L. Rev. 675, 687 (2015).

Thus, as the dissenting Justices observed below, the sliding-scale approach completely "undoes" the cabined framework that this Court "wrought in *Daimler*" "under the rubric of specific jurisdiction." Pet. App. 50a-51a (Werdegar, J., dissenting).

That conclusion does not deprive plaintiffs of a choice of several different places in which to bring their claims. A plaintiff may sue in the defendant's State of incorporation and State of principal place of business, as well as in other States, such as those in which the plaintiff resides and was injured—as long as the defendant's contacts with the latter States are

found to have the requisite connection to the plaintiff's claim.[2]

What a plaintiff may not do is invoke a specific jurisdiction theory to justify suit in a State in which the defendant's contacts had nothing to do with the plaintiff's own claim.

### B. The "Sliding Scale" Approach Is Unfair To Litigants And Would Harm The Court System.

The sliding-scale approach not only violates the core principles of specific jurisdiction; it also would impose serious burdens on the business community, the courts, and the federal system. These burdens are an additional, compelling reason that the lower court's holding should be reversed.

#### *1. A potential defendant would be wholly unable to predict where litigation might be brought—which would harm the entire economy.*

This Court has long recognized that the limitations on specific jurisdiction are meant to "give[] a degree of predictability to the legal system that allow[] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Spe-

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[2] As petitioner explains (Br. 37), the lower courts are divided with respect to the precise causal link between the plaintiff's claim and the defendant's forum contacts required to permit the exercise of specific jurisdiction. We agree with petitioner that proximate cause is the appropriate standard, but given the absence of any causal link here the Court is not obliged to resolve that question in order to reverse the judgment below.

cific jurisdiction's requirement of some link between the plaintiff's claim and the defendant's forum-related contacts assures defendants that they have a "due process right not to be subjected to judgment in [the] courts" of a State other than their home State, or States, unless they have affirmatively established contacts with the State itself and the claims at issue relate to those contacts. *Nicastro*, 564 U.S. at 881; see also *Walden*, 134 S. Ct. at 1123.

This "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) (rejecting interpretation of "principal place of business" that would render many large companies citizens of California). A company "knows that under the relationship standard, its potential for suit [in a State] will be limited to suits concerning the activities that it initiates in the state." Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness"*, 58 S.M.U. L. Rev. 1313, 1346 (2005); cf., *e.g.*, *World-Wide Volkswagen*, 444 U.S. at 297 (noting that a defendant that has "clear notice that it is subject to suit" in a forum "can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State").

Extending specific jurisdiction to claims that arose independent of the defendant's forum contacts would eliminate the predictability that specific jurisdiction rules are intended to provide. If plaintiffs could bring claims from all over the country in any State as long as they alleged a "common nationwide course of distribution," Pet. App. 28a, businesses' ability to predict where they are subject to specific

jurisdiction—and tailor their conduct to limit their exposure to jurisdiction—would be drastically reduced. A "company's potential liabilities [could not] be forecast from its [in-]state activities." *Id.* at 83a (Werdegar, J., dissenting). Indeed, a company that sold products or services nationwide would have no way of avoiding being trapped in mass actions in which most (if not all) of the claims arise from out-of-State conduct—no matter how "distant or inconvenient" the forum State for adjudicating those claims. See *World-Wide Volkswagen*, 444 U.S. at 292.

Applying specific jurisdiction in such an unpredictable and indiscriminate manner would be unfair to defendants and undermine the clarity that due process requires of jurisdictional rules. *See Nicastro*, 564 U.S. at 885 (explaining that "[j]urisdictional rules should avoid the[] costs [of unpredictability] whenever possible").[3]

The harmful consequences of this unpredictability, moreover, would not be limited to businesses: consumers would ultimately bear some of the costs as well. The legal costs imposed on businesses whenever they are forced to litigate high-stakes cases in

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[3] Notably, the European Union's regulation on jurisdiction provides for specific ("special") jurisdiction in tort cases only in "the courts for the place where the harmful event occurred." 2012 O.J. (L 351) 7 (ch. 2, § 2, art. 7(2)). The regulation makes only a limited exception for multi-*defendant* cases, in which suit is permitted where any defendant is domiciled as a means of avoiding "irreconcilable judgments resulting from separate proceedings." *Id.* at 8 (ch. § 2, art. 8(1)). The sliding-scale approach, therefore, would put the United States out of step with the straightforward approach that other nations use to provide defendants with "legal certainty" about their exposure to tort litigation in forums other than their domicile. *Id.* at 3.

unexpected forums would surely increase in an environment where a product liability claim against a nationwide manufacturer could essentially be brought anywhere. And some of that cost increase would invariably be borne by consumers in the form of higher prices.

The California court's approach to specific jurisdiction, if upheld, also could well discourage businesses from selling their products in magnet jurisdictions in the first place. In *Goodyear*, where a State court had sought to exercise general jurisdiction based on goods' having entered the State in the stream of commerce, the Solicitor General rightly warned that exercising general jurisdiction on those grounds "creates an obvious disincentive for foreign manufacturers to allow their goods to be distributed in the United States. Any resulting diminution in import traffic would harm United States residents, who would otherwise benefit from a broader range of available goods." Br. of U.S. as Amicus Curiae Supporting Petitioners at 30-31, *Goodyear* (No. 10-76).

So too here: by exposing defendants to the equivalent of general jurisdiction in every State where their products and services are sold, the sliding-scale approach will discourage companies from selling their products and services in certain States, burdening interstate commerce and reducing consumer choice.

*2. The sliding-scale approach would expand plaintiffs' ability to engage in abusive forum-shopping.*

The sliding-scale approach also would impose new burdens on courts, by enabling plaintiffs' law-

yers to shop aggressively for plaintiff-friendly forums and bring as many claims as possible there.

In pharmaceutical litigation, plaintiffs' counsel often seek to join together claims from plaintiffs across the country in particular "magnet jurisdictions" that are viewed as especially plaintiff-friendly. Before this Court decided *Daimler*, plaintiffs seeking to bring suit in such "magnet jurisdictions" would rely on expansive theories of general jurisdiction, arguing that the defendant companies did a high volume of business there.

*Daimler* foreclosed that approach by holding that even a "substantial, continuous, and systematic course of business" by the defendant is not enough to support general jurisdiction. 134 S. Ct. at 761 (internal quotation marks omitted). But the approach applied by the majority below circumvents *Daimler* and opens a new forum-shopping avenue for plaintiffs' lawyers, allowing the filing of a limitless number of claims in a desired forum as long as there is some nebulous parallelism between the claims and the defendant's forum contacts. See Charles W. Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 242 (2014) (rejecting the notion of "specific jurisdiction in every forum in which the defendant conducts continuous and systematic forum activities that are sufficiently similar to the occurrence in dispute," which "would give the plaintiff the choice of essentially every state for proceeding against a national corporation").

This Court should not permit such blatant gamesmanship. As this Court has recently observed, "public perception of judicial integrity"—and, by extension, of the integrity of the entire court system—

"'is a state interest of the highest order.'" *Williams-Yulee* v. *Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (quoting *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

That public perception would be undermined if the public believed, rightly or wrongly, that plaintiffs and plaintiffs' lawyers could ensure their desired outcome by shopping for and filing in particular forums. The Court therefore should not endorse the approach to specific jurisdiction taken by the majority below, which gives free rein to forum-shopping plaintiffs and all but guarantees that justice will no longer "satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).

### C. Permitting Specific Jurisdiction On The "Sliding Scale" Theory Infringes Important Federalism Interests By Allowing A State To Extend Its Authority Into The Legitimate Domain Of Sister States.

Finally, the sliding-scale approach violates basic principles of federalism.

Tying a forum State's authority to assert personal jurisdiction to a relationship between the plaintiff's claim and the defendant's activity in the forum State "ensure[s] that the States[,] through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. By expanding the scope of specific jurisdiction to encompass claims arising wholly from out-of-State conduct, the sliding-scale theory "infringe[s] directly on [other states'] sovereign prerogative to determine what liabilities [defendants] should bear for actions

in [their] borders." Pet. App. 83a (Werdegar, J., dissenting).

States have no legitimate interest in asserting specific jurisdiction so expansively and regulating conduct that occurred exclusively in other States. Rather, the State's interest is properly limited to adjudicating claims based on in-State activities.

As the dissent below explained, "Where the conduct sued upon did not occur in California, was not directed at individuals or entities in California, and caused no injuries in California or to California residents, neither our state's interest in regulating conduct within its borders nor its interest in providing a forum for its residents to seek redress for their injuries is implicated." *Id.* at 86a (citations omitted). Strictly enforcing the relatedness requirement thus maintains appropriate limits on specific jurisdiction—allowing States to protect their citizens and control conduct within their borders while preventing them from adjudicating claims that should be heard elsewhere.

This Court should therefore reject the sliding-scale approach and hold that specific jurisdiction is not permissible when the plaintiff's claim arose independently from the defendant's activity within the forum State.

## CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted.

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MARCH 2017

RECORD AND BRIEFS

No. 16-466

Supreme Court, U.S.
FILED
APR - 7 2017
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

*Respondent.*

On Writ of Certiorari
to the California Supreme Court

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* are law professors and legal scholars with expertise in the areas of civil procedure, complex litigation, conflict of laws, and transnational litigation. *Amici* have an interest in the proper interpretation of the constitutional restrictions on personal jurisdiction and their effect on civil adjudication. *Amici* believe that this Court's well-established principles confirm that California courts may permissibly exercise jurisdiction in this case.[1]

## SUMMARY OF ARGUMENT

Petitioner Bristol-Myers Squibb argues that specific personal jurisdiction "exists only where the defendant's contacts with the forum *caused* the plaintiff's alleged injuries and the resulting suit." Pet. Br. 17 (emphasis added). This has never been the law. While *general* jurisdiction may be amenable to narrowly defined categories, *specific* jurisdiction is not. Ever since this Court's pathmarking decision in *International Shoe Co. v. Washington*, specific

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[1] All parties have submitted letters granting blanket consent to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The law schools employing *amici* provide financial support for activities related to faculty members' research and scholarship, which helped defray the costs in preparing this brief. Otherwise, no person or entity has made a monetary contribution intended to fund the preparation or submission of this brief.

jurisdiction has been a far more flexible inquiry into the relationship among the forum, the defendant, and the dispute. This is as it should be. Requiring that specific jurisdiction rest on a strict causal link between the defendant's forum-state contacts and the plaintiff's claims provides no new benefits. Yet it would create uncertainty, risk destabilizing the system of litigation in both state and federal courts, and cast doubt on several of this Court's earlier personal jurisdiction decisions.

The current law, as established by this Court, is well calibrated both to ensure an appropriate forum for lawsuits and to prevent unfairness to defendants. To affirm the decision of the California Supreme Court in this case, the Court need only hold that Petitioner has purposefully availed itself of the privilege of conducting activities in California (which no one disputes), Respondents' claims relate to Petitioner's California contacts (which is barely, if at all, disputed), and California's assertion of jurisdiction is reasonable (which Petitioner has effectively conceded (Pet. App. 35a)). No more need be said.

The purpose of this brief is to explain why Petitioner's proposed causation rule is ahistorical, inconsistent with the principles of personal jurisdiction, potentially destabilizing, and unnecessary to protect defendants from abusive exercises of state power. In short, this Court should decline to adopt Petitioner's proposal and should leave the law on specific jurisdiction unchanged for three reasons.

First, this Court has never relied on a causation requirement to endorse—or reject—a state's exercise of personal jurisdiction over a defendant. In fact, for this Court to do so would be inconsistent with a number of cases in which this Court found—or all involved assumed—that there *was* personal jurisdiction over claims against the defendant that were not caused by its forum-state contacts.

Second, changing course now by adopting a causation requirement would lead to disruptive, inefficient, and unfair results—in both simple and complex litigation, and in both state and federal courts. A new causation test would throw into doubt even chestnuts of the first-year jurisdictional curriculum, like *World-Wide Volkswagen v. Woodson*. And it could wreak havoc with the way courts resolve our most complicated and economically important disputes, like the extensive litigation arising out of the ongoing Volkswagen "Clean Diesel" scandal.

Third, it is unnecessary to take that risk in order to protect defendants from litigating in an unfair forum. Indeed, in this case, Petitioner has not even argued that California is an unfair place to litigate. To the extent that Petitioner's concern is being haled into an inconvenient or distant forum, those concerns are already addressed in this Court's requirement that any exercise of personal jurisdiction be reasonable. And in cases where another court is manifestly more appropriate, defendants may move to transfer the case or dismiss on *forum non conveniens* grounds. To the extent that Petitioner's concerns relate to the law a court applies, such concerns are covered by each state's choice-of-law

rules and the constitutional restrictions on those rules. To the extent that Petitioner's concerns relate to a state's hostility towards out-of-state corporations, such concerns are addressed by diversity jurisdiction. Remedies for any such bias are therefore best left to Congress in defining the right to remove and the subject-matter jurisdiction of the federal courts. Finally, to the extent that Petitioner's concerns are that the cases are being litigated against it at all—as Petitioner candidly admitted before the Court of Appeal[2]—those concerns are not covered by the Due Process Clause.

## ARGUMENT

### I. Petitioner's Proposed Causation Rule Is Unprecedented.

Ever since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court has emphasized the need to retain flexibility in the law of personal jurisdiction, including in the minimum-contacts inquiry for specific jurisdiction. The Court has never suggested the strict causation requirement Petitioner seeks here. Indeed, such a requirement would be inconsistent with this Court's longstanding approach to personal jurisdiction.

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[2] Oral Argument at 23:18, *Bristol-Myers Squibb Co. v. Superior Ct.*, 175 Cal. Rptr. 3d 412 (Cal. Ct. App. 2014).

### A. Flexibility Is Integral To Specific Jurisdiction.

As *International Shoe* explained, the personal jurisdiction inquiry "cannot be simply mechanical or quantitative." *Id.* at 319. Since that decision in 1945, flexibility has been the hallmark of this Court's specific personal jurisdiction jurisprudence. The Court's regular endorsements of this flexibility have been as colorful as they are numerous. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985) ("[We] reject any talismanic jurisdictional formulas[.]"); *id.* at 486 ("[T]he Due Process Clause allows flexibility in ensuring that commercial actors are not effectively 'judgment proof' for the consequences of obligations they voluntarily assume in other States[.]"); *Kulko v. Cal. Superior Court*, 436 U.S. 84, 92 (1978) ("[T]he 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present. . . . We recognize that this determination is one in which few answers will be written 'in black and white. The greys are dominant, and even among them the shades are innumerable.'"); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) ("Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness[.]"); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) ("[T]he requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* . . . to the flexible standard of *International Shoe Co. v. State of Washington*.").

When evaluating "the relationship among the defendant, the forum, and the litigation," *Shaffer*, 433 U.S. at 204, this Court has considered a wide variety of contacts with different relationships to the case at hand, none of which is dispositive. That flexibility has allowed the Court to consider factors such as:

- The plaintiff's contacts with the forum state, *see Calder v. Jones*, 465 U.S. 783, 788 (1984) (noting that plaintiff's contacts "may be so manifold as to permit jurisdiction when it would not exist in their absence");

- The suit's connections to other states, *see Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) ("[I]t is certainly relevant to the jurisdictional inquiry that petitioner is seeking to recover damages suffered in all States in this one suit." (emphasis omitted));

- The forum state's interests in third-party citizens and interstate relations, *see id.* at 777–78 ("[T]he combination of New Hampshire's interest in redressing injuries that occur within the State and its interest in cooperating with other States in the application of the 'single publication rule' demonstrate the propriety of requiring respondent to answer to a multistate libel action in New Hampshire.");

- Market conditions, *see J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (plurality) (noting that courts may consider "[t]he defendant's conduct and the economic

realities of the market the defendant seeks to serve");

- And other unanticipated factors, *see, e.g.*, *id.* at 891–92 (Breyer, J., concurring in the judgment) (surveying other potential complications if "what has previously been this Court's less absolute approach" were replaced with a "more absolute rule").

This flexibility has allowed the courts to determine the limits and "clarify the contours of" personal jurisdiction through deliberate, case-by-case "judicial exposition" in "common-law fashion." *Nicastro*, 564 U.S. at 885 (plurality); *see also id.* at 891–92 (Breyer, J., concurring). That gradual approach to defining the outer bounds of states' power within our constitutional system is critical for avoiding unintended and potentially significant disruptions of state and federal adjudication.

Indeed, the Court relied on the flexibility of the specific-jurisdiction inquiry when it clarified in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), that general jurisdiction is limited to those forums where the defendant is essentially "at home." *See Daimler*, 134 S. Ct. at 758 n.9 ("'[W]e do not need to justify broad exercises of [general] jurisdiction unless our interpretation of the scope of specific jurisdiction unreasonably limits state authority over nonresident defendants.'" (quoting Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 676 (1988)). Adopting Petitioner's strict causation requirement for specific

jurisdiction on top of these more rigid rules of general jurisdiction would abandon the flexibility that has characterized the law of personal jurisdiction since *International Shoe*. *See, e.g.*, *id.* at 757–58 ("[G]eneral and specific jurisdiction have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized.").

The recent shift in the law of general jurisdiction also affects the lessons that can be drawn from the history of specific jurisdiction. Petitioner argues that this Court has looked for a causal nexus when assessing the existence of jurisdiction in every specific-jurisdiction case since *International Shoe*. Pet. Br. 11. Even if that were correct (which it is not, *see Keeton*, 465 U.S. at 775–76, 780), the claim is misleading: For seventy years, cases that might have presented this question were treated as uncontroversial exercises of personal jurisdiction. For example, the defendant in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), objected to a Kansas state court's jurisdiction over out-of-state class plaintiffs. But the Kansas court's personal jurisdiction over the *defendant* (a Delaware corporation with its principal place of business in Oklahoma) was uncontroversial, even though the named plaintiffs' claims (based on gas leases they owned in Oklahoma and Texas) did not have any causal connection to the defendant's natural-gas operations in Kansas. *Id.* at 799–801. Moreover, many cases assumed the existence of general jurisdiction under a "doing business" theory without

considering whether specific jurisdiction was available. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317 & n.23 (1981) (noting that personal jurisdiction was "unquestioned" where defendant was "at all times present and doing business in" the forum state); *Ferens v. John Deere Co.*, 494 U.S. 516, 519–20 (1990) (noting parties' agreement that defendant "was a corporate resident" of the forum state); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415–16 & n.10 (1984) (considering only whether the defendant's contacts with Texas gave rise to general jurisdiction).

This is not to suggest that there should have been personal jurisdiction in every one of these cases or that merely "doing business" is an appropriate basis for personal jurisdiction. Rather, the point is that this Court cannot assess the effect of introducing a causation requirement by considering only cases that have been labeled as exercises of "specific jurisdiction," because many cases that were uncontroversial exercises of general jurisdiction before *Goodyear* and *Daimler* would be candidates only for specific jurisdiction today.[3] As Petitioner has noted, this Court has never heard a case that required it to define clearly the scope of "arises out of

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[3] Petitioner conceded this point before the California Court of Appeal. Oral Argument 27:24, *Bristol-Myers Squibb Co. v. Superior Ct.*, 175 Cal. Rptr. 3d 412 (Cal. Ct. App. 2014). ("[T]hese kind[s] of specific jurisdiction arguments have not been filed because jurisdiction historically pre-*Daimler* has always been upheld based on general jurisdiction when you have a company that sells product nationwide and does significant business anywhere.").

or relates to," Cert. Pet. 10, in the context of specific jurisdiction. The absence of such a case should not itself suggest an answer to the question that the Court has repeatedly avoided answering, particularly given the wide variety of cases in which personal jurisdiction has either been found or assumed to exist under *International Shoe*, often without specifying whether that personal jurisdiction should be categorized as general or specific.

### B. There Is No Causation Requirement.

More notable is what this Court has *not* said: In seventy years of modern personal jurisdiction analysis, this Court has never stated a requirement that a defendant's in-state contacts must have caused the plaintiff's injuries. Instead it has repeated that a suit must "arise out of or *[be] connected with* the [defendant's] activities within the state." *Int'l Shoe*, 326 U.S. at 319 (emphasis added); *see also Daimler*, 134 S. Ct. at 754; *Goodyear*, 564 U.S. at 923–24; *Nicastro*, 564 U.S. at 881 (plurality); *Burger King*, 471 U.S. at 472; *Helicopteros*, 466 U.S. at 414 n.8.[4]

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[4] In most of the Court's opinions regarding specific jurisdiction that have not mentioned this requirement, the defendant lacked any purposeful contacts with the forum. In such a case, there is no need to consider how the defendant's non-existent contacts might be related to the cause of action. *See, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115, 1124 (2014) (concluding that the defendant "formed no jurisdictionally relevant contacts with" the forum state); *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("[T]he defendant has *no* contacts with the forum."); *Kulko*, 436 U.S. at 94 & n.7; *Hanson*, 357 U.S. at 251, 253. That is not this case.

By consistently phrasing this standard in the disjunctive (arise out of *or* relate to *or* are connected with), the Court has retained limited flexibility to account for cases like *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1983), in which this Court sustained the exercise of personal jurisdiction by "a state court over claims by [an] out-of-state plaintiff[] alleging out-of-state injuries from acts committed outside the forum State." U.S. Br. 15. In *Keeton*, New Hampshire lacked general jurisdiction over Hustler, an Ohio corporation with its principal place of business in California, *see* 465 U.S. at 779, but Hustler's regular business in New Hampshire was nonetheless "sufficient to support [specific] jurisdiction [over injuries sustained in other states] when the cause of action arises out of the very activity being conducted, *in part*, in New Hampshire," *id.* at 780 (emphasis added). Petitioner's proposed causation rule is inconsistent with the analysis in *Keeton*. *See also* Resp. Br. 24–27.

At the same time, just because this analysis has remained flexible does not mean that it is unpredictable. *Compare* Pet. Br. 27–30. For one thing, this Court has expressly incorporated predictability into the minimum-contacts inquiry. Specific jurisdiction requires that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297; *accord Calder*, 465 U.S. at 790; *Burger King*, 471 U.S. at 474. Similarly, this Court has required that the defendant "purposefully avails" itself of the forum state, *Burger King*, 471 U.S. at 475

(quoting *Hanson*, 357 U.S. at 253); *Nicastro*, 564 U.S. at 877, 88–91 (plurality), and has declined to find jurisdiction based on "random, fortuitous, or attenuated contacts," *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014), or the "unilateral activity of another party or a third person," *Helicopteros*, 466 U.S. at 417; *accord Walden*, 134 S. Ct. at 1123; *Burger King*, 471 U.S. at 475. This requirement of *purposeful* contacts with a forum that also *relate* to the cause of action—even without a strict causation requirement—ensures a defendant will have "clear notice that it is subject to suit there" and allow it "to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen*, 444 U.S. at 297.

It was, of course, entirely predictable that plaintiffs who claim to be injured by Plavix would sue Petitioner in California—the state in which it sold over 180 million Plavix pills from 2006–2012. Pet. App. 4a–5a. As the California Supreme Court explained, "[o]n the basis of [its] extensive contacts relating to the design, marketing, and distribution of Plavix, BMS would be on clear notice that it is subject to suit in California concerning such matters." Pet. App. 25a.

## II. Petitioner's Proposed Causation Rule Would Be Disruptive In Both Simple And Complex Litigation.

Petitioner's proposed causation rule would not just be novel and unprecedented. It would be deeply

unsettling to accepted practice in both simple and complex cases, in both state and federal courts. Upending the law as Petitioner urges would cause litigation about jurisdiction to proliferate regarding the cascade of new questions spawned by Petitioner's new rule. These complications, moreover, do nothing to further the values of federalism, predictability, and fairness that have driven this Court's specific jurisdiction jurisprudence.

### A. Petitioner's Proposed Causation Rule Does Not Ensure Predictability Or Administrability In Personal Jurisdiction.

Petitioner suggests that a causation test—in particular a proximate-cause requirement—"ensures predictability and administrability." Pet. Br. 13. Petitioner is wrong. Any first-year law student can attest to the difficulty of defining "proximate cause." *See, e.g., Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (N.Y. 1928). As the courts have noted in other contexts, "the principle of proximate cause is hardly a rigorous analytic tool." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 n.13 (1982); *see also id.* at 478 (referring to the concept of proximate cause as "elusive"); *McBride v. CSX Transp., Inc.*, 598 F.3d 388, 393 n.3 (7th Cir. 2010), *aff'd*, 564 U.S. 685 (2011) ("The term 'proximate cause' does not easily lend itself to definition."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 at 263 (5th ed.1984) ("There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion [as defining 'proximate cause'].

Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the best approach." (footnote omitted)). To import such a problematic standard to the law of personal jurisdiction would serve only to complicate matters further.

Even Petitioner's description of this case highlights the challenges of a causation inquiry—proximate or otherwise. In the first paragraph of its Introduction, Petitioner's Brief describes what Bristol-Myers did not do: "It is undisputed that Bristol-Myers did not develop or manufacture Plavix in California; that the drug was not marketed, promoted, or distributed to respondents in California; and that respondents did not receive or fill their prescriptions, ingest the drug, or suffer any injuries in California." Pet. Br. 1. But Petitioner does not explain which of these nine activities would constitute causation—whether proximate or but-for—if it had in fact occurred in California. Determining which, if any, of these connections with a state is sufficiently causally connected to plaintiffs' injuries to justify personal jurisdiction would have to be hashed out in the lower courts over the coming years.

### B. Even In Seemingly Simple Cases, Petitioner's Proposed Causation Rule Would Be Disruptive, Inefficient, And Unfair.

The lack of clarity and administrability that Petitioner's rule would generate is just the tip of the iceberg. Even in currently uncontroversial and simple cases, Petitioner's proposed causation rule

would mark a major departure from settled personal jurisdiction doctrine and would lead to disruptive, inefficient, and unfair results.

Consider the facts of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In that case, the Robinson family was injured when the gas tank of their Audi exploded in a crash on an Oklahoma highway. The Robinsons sued Audi along with the importer, the wholesaler, and the dealer, alleging that the car had been defectively designed. The Court held that the Oklahoma courts lacked personal jurisdiction over the New York-based dealership where the Robinsons had bought the car and the regional wholesaler that sold the car to the dealership because they had not purposefully availed themselves of the privilege of conducting activities in Oklahoma. But "an objection to jurisdiction by the manufacturer [Audi] or national distributor [Volkswagen] would have been unavailing." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 907 (2011) (Ginsburg, J., dissenting) (describing *World-Wide Volkswagen*). Indeed, the Court in *World-Wide Volkswagen* explained, "if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." 444 U.S. at 297.

Under Petitioner's proposed rule, however, Oklahoma may lack specific jurisdiction over the manufacturer, Audi, for injuries resulting from the explosion of the Robinsons' Audi in Oklahoma. Audi's marketing and sale of thousands of identical cars in Oklahoma would be neither a "but-for" nor "proximate" cause of the Robinsons' injuries. After all, they bought their Audi in New York. Indeed, the Robinsons' claims would be "exactly the same" if Audi had "no contacts" with Oklahoma at all, which Petitioner contends "alone is dispositive" of the jurisdictional question. Pet. Br. 47.

Petitioner's proposed causation rule goes even further. Imagine that the driver of the car that collided with the Robinsons, an Oklahoma resident with no out-of-state contacts, was also injured by the explosion. Petitioner's causation rule would also prohibit the Oklahoma driver from suing Audi in the Oklahoma courts because the particular product that caused his injury was brought into the state by a third party—the Robinsons. Again, Audi's purposeful and extensive marketing of identical products in Oklahoma would not be the "but for" or "proximate" cause of the Oklahoma driver's injuries. *See* Pet. Br. 47. The same no-jurisdiction result would obtain under Petitioner's test even if Audi conceded that personal jurisdiction would be reasonable in Oklahoma and even if Audi was subject to an ongoing suit in Oklahoma for the exact same defect.

This result makes little sense given the policies that Petitioner acknowledges underlie specific jurisdiction—"federalism, predictability, and fairness." Pet. Br. 17. There is no reason to think

that New York, where Audi sold the particular car that caused the injury, has any greater interest than Oklahoma in adjudicating the dispute between the Oklahoma driver and the car manufacturer that purposefully sold thousands of identical cars in Oklahoma. Indeed, a New York court would probably apply Oklahoma law to such a dispute. *See, e.g.*, *Edwards v. Erie Coach Lines Co.*, 952 N.E.2d 1033, 1037 (N.Y. 2011). Oklahoma would not "tread on" New York's "domain" in any meaningful sense by entertaining such a suit. *Contra* Pet. Br. 27 (quoting *Nicastro*, 564 U.S. at 899 (Ginsburg, J., dissenting)). Nor is a product liability suit in Oklahoma in any way unpredictable for Audi, given its extensive marketing of identical products in Oklahoma. No strict causal test is needed for a product manufacturer to be able to predict that it may be subject to suit for product defects in a state where it purposefully avails itself of the privilege of extensively marketing the allegedly defective product. For the same reason, a strict causal test is not necessary to ensure "fairness"; indeed, as this example illustrates, it can just as easily lead to unfairness—closing the doors to the Oklahoma courts to an Oklahoma plaintiff filing suit for injuries suffered in Oklahoma against a product manufacturer that purposefully avails itself of the privilege of selling those products in Oklahoma.

The problems with a strict causation rule multiply when joinder rules are taken into account. Assume that the Robinsons sued the Oklahoma driver for their injuries in state or federal court in Oklahoma—the only state likely to have personal jurisdiction over the driver. And assume that the

driver wanted to implead Audi for contribution, claiming that the collision would have been a fender bender if the gas tank had not been defective. Petitioner's proposed causation rule would prevent a single court from hearing all of these related claims together and would instead require the Oklahoma driver to seek contribution from Audi in a separate suit in New York (where Audi sold this particular car to the Robinsons) or Germany (where it is headquartered). To be sure, all of the potential parties to a dispute cannot always be joined in a single lawsuit, even if a single suit would be the most efficient. The bedrock principle is still "fair play and substantial justice," which requires purposeful availment. *World-Wide Volkswagen*, 444 U.S. at 297; *Int'l Shoe*, 326 U.S. at 316. So, for example, in *Nicastro*, the plaintiff might not be able to sue both his New Jersey employer and the British manufacturer of the machine that injured him in the same suit. But Petitioner's causation rule needlessly multiplies the instances where this is so, sacrificing efficiency without any offsetting benefit in terms of fairness, predictability, or interstate federalism.

### C. Petitioner's Proposed Causation Rule Would Wreak Even Greater Havoc In Complex Litigation.

The inefficient, unfair, and unexpected results of Petitioner's proposed causation requirement would metastasize in the context of complex litigation. Consider another familiar Volkswagen litigation—the more recent one arising out of the "clean diesel" scandal. Volkswagen AG, a German corporation, admitted to U.S. government authorities that it had

rigged its so-called "clean diesel" cars to perform efficiently under testing conditions, even though the cars in fact could not pass U.S. environmental standards. Volkswagen's fraudulent scheme, which was conceived in and orchestrated from its German headquarters, harmed U.S. consumers throughout the United States. But because Volkswagen AG is incorporated and headquartered in Germany, it is unlikely there is general jurisdiction over Volkswagen anywhere in the United States. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014); *but cf. id.* at 761 n.19.

At a basic level, as suggested above, the application of Petitioner's causation rule to any plaintiff's claim against Volkswagen is not clear, especially because the defendant is a foreign corporation whose sales and marketing targeted the nationwide market through independent distributors or other third parties, like local dealerships. Likewise, if a plaintiff wanted to sue those local dealerships and *either* party wanted to join Volkswagen into that litigation, they would face challenges under Petitioner's causation requirement even if the court would otherwise deem Volkswagen to be subject to joinder.

The *Clean Diesel* litigation also demonstrates how the inefficient, unfair, and unexpected results of Petitioner's proposed causation requirement extend to federal claims and federal courts.[5] The federal

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[5] Petitioner and the United States seem to seek refuge in the proposition that federal courts would have a broader scope

of specific personal jurisdiction under the Fifth Amendment than state courts would have under the Fourteenth Amendment. This theory depends on a distinction between the Fifth and Fourteenth Amendments' due process requirements that this Court has never defined. *See, e.g., Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (declining to consider the "constitutional issues raised by this theory"). The United States hints at its reasoning, however, in its brief in *BSNF Railway Co. v. Tyrrell*, No. 16-405, suggesting that "Congress's express constitutional power over and special competence in matters of interstate and foreign commerce . . . enables Congress, consistent with the Fifth Amendment, to provide for the exercise of federal judicial power in ways that have no analogue at the state level." U.S. Br., No. 16-405, at 32. While this Court may welcome Congress's guidance on issues such as the requisite minimum contacts with the United States that a defendant must have in order for a federal court to exercise personal jurisdiction over it, that guidance is surely not dispositive of the due process question, regardless of the extent of overlap between the Fifth and Fourteenth Amendment due process inquiries. *Cf. Asahi Metal Indus. Co. v. Cal. Superior Court*, 480 U.S. 102, 113 n.* (1987) ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.").

This question is not briefed in this case, yet adopting Petitioner's causation rule without resolving it may draw into question the constitutionality of significant federal statutes that depend on nationwide service of process. *See, e.g.*, 15 U.S.C. § 22 (Clayton Act); 15 U.S.C. § 78aa(a) (Securities Exchange Act); 18 U.S.C. § 1965(a) (RICO); 18 U.S.C. § 2334 (Antiterrorism Act); 29 U.S.C. § 1132(e)(2) (ERISA); 31 U.S.C. § 3732(a) (False Claims Act). Should the Court wish to define the due-process boundaries of federal-court jurisdiction, we would respectfully encourage it to do so in a case squarely raising this complex question, and in which it is fully briefed.

court complaints in the *Clean Diesel* litigation alleged two principal federal claims: first, under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (RICO), and second, under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* (MMWA), colloquially known as the federal "Lemon Law." Consider first the MMWA claims. The MMWA does not include any provision for nationwide service of process, so like most federal statutes,[6] personal jurisdiction under the MMWA is defined by Federal Rule of Civil Procedure 4(k)(1)(A), which relies, in turn, on the scope of the jurisdictional power of the state where the federal court sits.

Under Petitioner's vision of specific jurisdiction, a litigation involving plaintiffs from different states, whose injuries were "caused" by Volkswagen's marketing and sales practices in whichever state they purchased their cars, would have to be split—separate actions in each state would be necessary, and the fact that they would present federal questions in federal courts would do nothing to fix this jurisdictional result. The resultant claim splitting would undermine the regulatory interest behind the MMWA (and countless other federal statutes), despite the fact that Volkswagen had

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[6] *See, e.g.*, 15 U.S.C. § 1681 (Fair Credit Reporting Act); 15 U.S.C. §§ 1692–1692p (Fair Debt Collection Practices Act); 29 U.S.C. §§ 201–219 (Fair Labor Standards Act); 29 U.S.C. §§ 2601–2654 (Family Medical Leave Act); 42 U.S.C. §§ 12101–12213 (Americans with Disabilities Act); 42 U.S.C. § 2000e *et seq.* (Title VII of the Civil Rights Act of 1964); 15 U.S.C. §§ 1051–1127 (Lanham Act).

ample contacts with many states through its marketing and sales efforts, and even though it would be foreseeable and reasonable to hale Volkswagen into court in those states.

Petitioner's causation requirement might create problems for the RICO claims as well. Although RICO includes a provision for nationwide service of process, 18 U.S.C. § 1965, it is not clear whether Petitioner's rule would allow plaintiffs bringing nationwide RICO claims to join their MMWA claims without establishing in-state causation. A prudent plaintiff worried about claim preclusion, therefore, might bring both the MMWA and RICO claims in her home jurisdiction, thus splitting up nationwide RICO suits, too.[7]

In short, Petitioner seems to be advocating cutting up nationwide lawsuits into 50 separate suits and dispersing such cases to multiple different states, regardless of the convenience to the courts or any of the litigants, including defendants themselves.[8] In so

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[7] The concern here is that the Petitioner's causation rule as described may interfere with the ability of a plaintiff to join related claims against the same defendant for which there would not be independent personal jurisdiction. *See* Restatement (Second) of Judgments § 9 (1982); 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1069.7 (4th ed. 2017).

[8] The United States suggests that it is unconcerned if foreign defendants become harder to sue under Petitioner's causation rule because suits against foreign defendants can have "implications for the United States' international relations and trade interests." U.S. Br. 26. But Volkswagen likely appreciated the ability to resolve the expansive claims against it

doing, Petitioner's rule would also undermine the regulatory interests of Congress and the states.

Ironically, this result would conflict with Petitioner's asserted values and also with Congress's intent in the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2, 119 Stat. 4 (2005). In CAFA litigation, defendants commonly criticize plaintiffs' splitting up cases as a deceptive mechanism for avoiding federal court litigation;[9] here, Petitioner seems to be arguing that Due Process *requires* such an approach, even while it concedes that California's exercise of personal jurisdiction in this case would

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as expeditiously as possible in a single jurisdiction. Moreover, the United States neglects to mention that the laws of other countries, including the European Union rules it cites, would likely permit pendent personal jurisdiction over BMS in a case like this one because co-defendant McKesson is headquartered in California. Parliament and Council Regulation 1215/2012, 2012 O.J. (L 351) art. 8 ("A person domiciled in a Member State may also be sued: . . . (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings[.]").

[9] Indeed, in this litigation Petitioner first tried to aggregate claims in order to remove this litigation to federal court. *See* Resp. Br. 7–8. Courts are divided on whether plaintiffs may split claims in ways that avoid federal subject-matter jurisdiction under CAFA. *See, e.g., Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407–09 (6th Cir. 2008) (forbidding such splitting); *Marple v. T-Mobile Central LLC*, 639 F.3d 1109, 1110–11 (8th Cir. 2011) (allowing it).

comport with the ultimate standard of "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316.

### D. Multidistrict Litigation Does Not Solve The Problems Petitioner's Proposed Causation Rule Would Create.

Both the Petitioner's and the Government's briefs suggest that any complications created by new, more restrictive limits on state-court jurisdiction are inconsequential because of the availability of multidistrict litigation (MDL), 28 U.S.C. § 1407, to consolidate pretrial proceedings in cases filed nationwide in a single federal district court. *See* Pet. Br. 51; U.S. Br. 30 & 31 n.4. This is incorrect. Not only could Congress repeal the MDL statute at any time, but even in its current form, MDL does not provide a cure-all to the inefficient scattering of litigation that would be made necessary by a rigid causation requirement for specific jurisdiction. And even in MDLs in which remand never occurs, consolidated pretrial proceedings, which include dispositive-motion practice, provide none of the protections to defendants and states thought to be central to personal jurisdiction doctrine.

First, MDL does not expand the number of forums in which a plaintiff may file a lawsuit. Although MDL does provide for transfer of cases properly filed in district courts to a single court for consolidated pretrial proceedings, the courts in which the cases were initially filed must have personal jurisdiction. 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866 (4th ed.

2017) ("A party who is not subject to personal jurisdiction in the original court cannot be validly served in the transferee district."). Moreover, MDL of course cannot reach cases that fall beyond the federal courts' subject-matter jurisdiction—such as the cases involved here, which are statutorily barred from removal because of the presence of McKesson, an in-state defendant. *Id.* Finally, as this Court has held, MDL consolidation is *only* for pretrial proceedings; the cases must be remanded to the courts in which they were filed for trial. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998). MDL therefore does nothing to ensure that those cases will not disperse across the country once pretrial proceedings conclude. In sum, MDL does not correct for the inefficiencies created by Petitioner's proposed rule.

Second, Petitioner's enthusiasm for MDL is curious given what it cites as the "purposes" of specific jurisdiction: "federalism, predictability, and fairness." Pet. Br. 17. With respect to either protecting defendants from geographic inconvenience *or* safeguarding individual states' interests in litigating cases arising from conduct occurring within their borders, MDL provides almost no protections. Although cases must be returned to the transferor districts for trial, during pretrial proceedings the judge presiding over the MDL has complete power, including overseeing discovery and dispositive-motion practice. Because the Judicial Panel on Multidistrict Litigation (JPML) can establish an MDL in any federal district, defendants may find themselves litigating all pretrial procedure in "thousands of claims brought by thousands of plaintiffs" anywhere

in the country. Pet. Br. 50; *see also In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue.").

Thus, in mass-tort cases like the litigation here, the JPML has repeatedly suggested that virtually any federal district will be acceptable for an MDL. *See, e.g., In re Takata Airbag Prods. Liab. Litig.*, 84 F. Supp. 3d 1371, 1372 (J.P.M.L. 2015) ("The litigation is nationwide in scope. . . . No one district stands out as the geographic focal point."); *In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices, & Prods. Liab. Litig.*, 996 F. Supp. 2d 1380, 1383 (J.P.M.L. 2014) ("This litigation is nationwide in scope, and thus almost any district would be an appropriate forum."). Moreover, in cases of nationwide scope, the JPML has often selected districts having nothing to do with the defendants' geographic home, instead prioritizing features like the experience of the transferee judge or docket conditions in the transferee district. *See, e.g., In re Actos Prods. Liability Litig.*, 840 F. Supp. 2d 1356, 1356–57 (J.P.M.L. 2011) ("The allegations in this nationwide litigation do not have a strong connection to any particular district. . . . [C]entralization in the Western District of Louisiana permits the Panel to assign the litigation to an experienced judge who sits in a district in which no other multidistrict litigation is pending"). As a former Chairman of the JPML candidly explained, "location may be less of an overriding consideration, particularly where the litigation lacks a singular geographical focal point."

John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2239 (2008).

There is, of course, an MDL involving Plavix litigation properly in federal court pending in the District of New Jersey, but the JPML could have placed that MDL in any federal district, regardless of where the component cases arose. Indeed, in the *Clean Diesel* case, the JPML selected the Northern District of California as the MDL district, not because the defendant was subject to general jurisdiction there, but because at the time of the MDL's creation thirty actions were already pending there, and the district judge selected had an especially accomplished record of success presiding over MDLs. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 148 F. Supp. 3d 1367, 1369–70 (J.P.M.L. 2015).

Ultimately, Petitioner's endorsement of MDL does not redeem the new restrictions it seeks to impose on the states. To the contrary, the combination of MDL and Petitioner's proposed causation rule may present the worst of both worlds, simultaneously imposing new inefficiencies while doing nothing to enhance protections to defendants ensnared in nationwide mass-tort litigation. If anything, Petitioner's endorsement of MDL should raise eyebrows: consolidation of nationwide litigation in any single federal district does not promote any of the "purposes behind the specific jurisdiction doctrine" cited in Petitioner's brief, namely, to ensure "fair notice as to where [defendants'] conduct would subject them to suit," to avoid "forc[ing] defendants to defend claims in a place where none of the conduct

giving rise to the suit occurred," and to "prohibit States from enforcing obligations that a defendant incurred exclusively through conduct undertaken in and directed at other States." Pet. Br. 12. MDL cannot solve the problems that Petitioner's proposed causation rule will create.

## III. Petitioner's Proposed Causation Rule Is Unnecessary Because Numerous Doctrines Beyond "Minimum Contacts" Already Protect Defendants From State-Court Unfairness.

Not only will Petitioner's proposed causation rule produce inefficient, unfair, and unexpected results, but it is also unnecessary to protect defendants from abusive exercises of jurisdiction. In addition to the safeguards built into the minimum-contacts analysis, the "reasonableness" requirement and the *forum non conveniens* doctrine together provide a check against prohibitively inconvenient forums. And other doctrines, external to personal jurisdiction, further check extravagant exercises of state-court power. Taken together, these checks render Petitioner's novel and restrictive interpretation of minimum contacts unnecessary.

### A. The "Reasonableness" Requirement And The *Forum Non Conveniens* Doctrine Provide A Check Against Prohibitively Inconvenient Forums.

To the extent that Petitioner is concerned that defendants may be forced to litigate in unfair or inconvenient geographic locations, no causation test is required. Although it is barely mentioned in

Petitioner's brief, the Due Process Clause already requires that exercises of personal jurisdiction be reasonable, even if minimum contacts exist. As this Court explained in *Burger King*: "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" 471 U.S. at 476 (quoting *Int'l Shoe*, 326 U.S. at 320). This test mandates that courts assess the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering substantive social policies. *Id.* at 477. The reasonableness requirement provides a potent check against unfair exercises of jurisdiction, particularly when the contacts between the defendant and the forum state are otherwise attenuated. In *Asahi*, for example, this Court found California's assertion of jurisdiction to be unreasonable in a case that ultimately involved two non-residents of California, in which California law was unlikely to apply, and where the burden on the defendant of litigating in California would be heavy. 480 U.S. at 116.

The existing reasonableness inquiry, in other words, will bar jurisdiction in many of the cases that Petitioner's causation rule purportedly targets. To bolster its argument, Petitioner relies on hypothetical cases in which, under current law, it would be

patently *unreasonable* for a state to exercise jurisdiction under the Court's set of factors, such as its fanciful suggestion that nationwide jurisdiction in California would be appropriate even if it had sold Plavix to only one customer in California. Pet. Br. 50.

Moreover, in cases where the location of the lawsuit is especially inconvenient, defendants may move to dismiss for *forum non conveniens*. *See Burger King*, 471 U.S. at 477 (noting that unfairness related to the plaintiff's choice of forum "usually may be accommodated through means short of finding jurisdiction unconstitutional"). States, including California, regularly dismiss or stay cases on the basis of *forum non conveniens* when a sister state's court will be more convenient for the parties and witnesses, particularly when neither party is from the forum state and forum law is unlikely to apply. *See, e.g.*, CAL. CODE CIV. PROC. § 410.30(a) ("When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."); *David v. Medtronic, Inc.*, 188 Cal. Rptr. 3d 103, 112 (Cal. Ct. App. 2015) (affirming dismissal on *forum non conveniens* grounds of products-liability claims by 36 non-Californians against non-California defendants); *Baltimore Football Club, Inc. v. Superior Court*, 171 Cal. App. 3d 352, 365 (Cal. Ct. App. 1985) (dismissing "claims of nonresidents under sister state laws against non-California defendants"). Notably, in this case, the trial court has not yet ruled on a motion to

sever the claims of the out-of-state plaintiffs, which Petitioner has preserved pending this appeal.[10]

### B. Other Doctrines Also Check Extravagant Exercises Of State-Court Power.

It is all the more unnecessary to disrupt this Court's personal jurisdiction jurisprudence with Petitioner's proposed causation rule because other doctrines already protect defendants from excessive, extravagant, or imperialistic exercises of state-court power. These doctrines include state choice-of-law rules, which are themselves confined by constitutional restraints, and statutory bases for diversity jurisdiction and removal, which are best defined by Congress.

#### 1. Limitations On State Choice Of Law Protect Defendants From Overly Aggressive Assertions Of State Power.

To the extent that Petitioner's concerns relate to application of forum law to claims occurring nationwide, such concerns are best handled as a

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[10] Def. Bristol-Myers Squibb Co.'s Mem. of Points and Authorities in Support of Mot. to Quash Service of Summons of Compl. for Lack of Personal Jurisdiction, July 9, 2013 ("In the alternative, if this motion to quash is denied, BMS separately will renew its motion to sever the claims of the Plaintiffs in these eight related suits and then to dismiss those brought by non-California residents on the grounds of *forum non conveniens*.").

matter of choice of law rather than personal jurisdiction. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (holding that a state may not use assumption of jurisdiction as an added weight in the scale when considering the permissible limits on choice of substantive law); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984) (explaining that choice of law can be litigated "after jurisdiction over respondent is established, and we do not think that such choice-of-law concerns should complicate or distort the jurisdictional inquiry"). A state adjudicating a nationwide set of claims against an out-of-state defendant may not constitutionally apply its own substantive law to every plaintiff's cause of action. *Shutts*, 472 U.S. at 821–23 (rejecting Kansas state court's application of forum law to nationwide class action when many claims arose outside of Kansas). Indeed, in order to constitutionally apply its own substantive law, "that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981).

Beyond constitutional limitations, even though their approaches may differ, all states follow choice-of-law rules crafted to select the most appropriate law and prevent forum shopping. *See Burger King*, 471 U.S. at 477 (noting that "the potential clash of the forum's law with the 'fundamental substantive social policies' of another State may be accommodated through application of the forum's choice-of-law rules"). California is no exception. Like most states, California has enacted a borrowing

statute that applies the statute-of-limitations period of the state where the cause of action arose. CAL. CODE CIV. PROC. § 361; ROBERT C. CASAD & LAURA J. HINES, JURISDICTION AND FORUM SELECTION § 2:25 (2d ed. 2016) ("Most states have enacted some statutory rules to limit the opportunities for this kind of forum shopping."). With respect to choice of law generally, California, which follows the governmental-interest approach to choosing law, has been restrained when it comes to applying forum law, regularly vindicating the interests of sister states by applying their laws in tort cases—even when the plaintiff is a California resident. *See, e.g.*, *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 538 (Cal. 2010) (applying Oklahoma's more restrictive statute of repose to California resident's personal-injury claim against New York corporation when exposure to allegedly harmful asbestos occurred in Oklahoma); *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721, 729 (Cal. 1978) (applying Louisiana law to California plaintiff's claim against an out-of-state corporation for injuries occurring in Louisiana); *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430, 443–44 (Cal. Ct. App. 2007) (applying Alabama law to a suit by a California resident injured in an automobile accident occurring in Alabama, citing the states' "respective spheres of lawmaking influence" (internal quotation marks omitted)).

### 2. Congress Is Best Situated To Address Bias Against Out-Of-State Corporate Defendants.

To the extent that Petitioner's concerns are about bias by state courts against out-of-state corporations,

personal jurisdiction doctrine is not the right vehicle for addressing those concerns. As this Court has reaffirmed in numerous contexts, state courts are presumptively fair and adequate. *See Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." (emphasis omitted)); *Sumner v. Mata*, 449 U.S. 539, 549 (1981) ("State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office."); *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 58 (1912) ("We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion."). When a state court's procedures fall short, a litigant can challenge particular unfair provisions as deprivations of due process. *See, e.g.*, *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (finding that Arkansas scheme of notice in tax-sale proceeding violated the Fourteenth Amendment); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421–22, 428 (2003) (rejecting state-court award of punitive damages in part because it was based on defendant's out-of-state conduct lawful in the state where it occurred).

More general concerns about potential state-court bias or unfairness are best addressed to the Congress, which can provide a remedy by calibrating

the diversity jurisdiction of the federal courts. *See* Class Action Fairness Act of 2005, S. Rep. 109-14, at 6 (Feb. 28, 2005) (noting the need for legislation to "prevent . . . state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation"). Should Petitioner prefer the MDL process to state-court jurisdiction, as it seems to, it could also ask Congress to broaden access to federal consolidation by allowing federal jurisdiction in multiparty cases on the basis of minimal diversity or by allowing removal by in-state defendants in cases that would be transferred to an MDL for pretrial proceedings. Amending the statute in this way would trade geographic predictability and state-court control of litigation in exchange for a single federal forum for pretrial proceedings. But any such exchange should be accomplished through legislation. In short, if the policy goal is to allocate cases between state and federal courts or to calibrate aggregate litigation, that is a matter for Congress, not the Constitution.

## CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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RECORD AND BRIEFS.

No. 16-466

FILED
MAR - 7 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The California Supreme Court**

## BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICUS CURIAE*[1]

DRI-The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the certiorari and merits stages in carefully selected Supreme Court cases which present questions that are exceptionally important to civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

The issue in this case—the ability of out-of-state plaintiffs to pursue mass tort litigation against a corporate defendant that is not "at home" in the forum state—is a subject of fundamental importance to DRI and the civil defense bar. A state court's assertion of personal jurisdiction over nonresident corporate defendants implicates the fairness of the civil justice system, in other words, due process

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI-The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. Counsel of record have lodged blanket consents to the filing of *amicus* briefs.

concerns which this Court repeatedly has emphasized involve "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted); *see, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (quoting *Int'l Shoe*); *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (same); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918-19 (2011) (same); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 863, 880 (2011) (same); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413 (1984) (same); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (same).

"Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs . . . ." *Walden*, 134 S. Ct. at 1122. The California Supreme Court's 4-3 majority opinion in this case, however, tramples on petitioner Bristol-Myers Squibb's due process rights. Despite the absence of a causal connection between that out-of-state company's California activities and the out-of-state plaintiffs' product liability claims, the majority opinion allows those plaintiffs to "forum shop" their claims and sue Bristol-Myers Squibb ("BMS") in California state court based on a subjective "sliding scale approach to specific jurisdiction." Pet. App. 32a. That fuzzy test for demonstrating the "relatedness" needed to establish case-specific jurisdiction over a nonresident defendant, *see Helicopteros*, 466 U.S. at 414, obliterates this Court's "distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction," *Daimler*, 134 S. Ct. at

751. Even where, as here, nonresident plaintiffs' claims have no connection to California and would be exactly the same if the out-of-state defendant had no contacts with California at all, the state supreme court's tilted sliding-scale extends the reach of personal jurisdiction to a product liability defendant merely because its promotional and distribution activities are nationwide. *See* Pet. App. 29a-30a. In reality, the California Supreme Court's sliding scale is a sliding door that opens automatically for nonresident mass tort plaintiffs and forum-shopping attorneys who choose to subject nonresident corporations to the enormous risks and burdens of litigation in one of the nation's most plaintiff-friendly state court systems.

*Amicus curiae* DRI-The Voice of the Defense Bar urges this Court to reverse the California Supreme Court and issue an opinion that requires state courts to align their exercise of personal jurisdiction over out-of-state defendants with this Court's precedents and the mandates of due process.

## SUMMARY OF ARGUMENT

The California Supreme Court acknowledged that "the ultimate question under the due process clause [is] whether the exercise of jurisdiction is fair." Pet. App. 22a. But over a strong dissent, the majority opinion departs from "traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. It subjects out-of-state corporate defendants to the "specific jurisdiction" of California state trial courts in order to adjudicate out-of-state plaintiffs' mass tort claims that have no substantial connection to a defendant's California-specific activities. Under the

majority's "sliding scale approach," Pet. App. at 32a, a mass tort defendant's "nationwide marketing and distribution" of a widely used product (here, a brand-name prescription drug), *id.* at 29a, is enough of a nexus for hundreds of nonresident plaintiffs to hale a nonresident manufacturer into the throes of litigating in the California state court system. The state supreme court's expansive view of specific jurisdiction conflicts with this Court's personal jurisdiction jurisprudence, which is founded upon due process concerns and includes recent cases such as *Walden*, *Daimler*, and *Goodyear*.

This Court should not allow California (or any other state) to employ a lax approach toward specific jurisdiction as a way of attracting out-of-state mass tort plaintiffs and their forum-shopping counsel. California *in particular* should not be permitted to use a slanted sliding scale as a way of elevating its state court system into a national forum for trial of nonresident plaintiffs' mass tort claims against corporate defendants that are not "at home" in the State. As this brief explains, California's state court system, both in terms of substantive law and trial-court procedures, is already notorious for stacking the deck against manufacturers of allegedly defective products.

## ARGUMENT

### I. THE CALIFORNIA SUPREME COURT'S EXPANSIVE VIEW OF SPECIFIC JURISDICTION IS AN OPEN INVITATION TO FORUM SHOPPERS

#### A. The majority opinion encourages nonresident mass tort plaintiffs to sue nonresident corporate defendants in California state courts

At least since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court, in many different contexts, has decried various forms of "forum shopping." *See, e.g.*, *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1672 (2015) (rejecting a state judge recusal rule "that would enable transparent forum shopping"); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) ("The federal limitations period governing copyright suits serves . . . to prevent the forum shopping invited by disparate state limitations periods . . . ."); *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 583 (2013) (federal change-of-venue statute "should not create or multiply opportunities for forum shopping" where parties have agreed to a contractual forum-selection clause) (internal quotation marks omitted); *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 415 (2010) ("We must acknowledge the reality that keeping the federal court-door open to class actions that cannot proceed in state court will produce forum shopping."); *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) ("The interpretation given to the Arbitration Act by the California Supreme Court would . . . encourage and reward forum shopping."); *Hanna v. Plumer*, 380 U.S. 460,

468 (1965) (The "outcome-determination" test for application of state law in federal diversity cases "cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."); *see also* Note, *Forum Shopping Reconsidered*, 103 Harv. L. Rev. 1677, 1681 (1990) ("The Supreme Court has relied on the 'danger of forum shopping' in reaching many decisions.").

The California Supreme Court's flexible sliding-scale standard for jurisdictional relatedness, however, *encourages* forum shopping by opening the State's courthouse doors to multitudes of out-of-state product liability plaintiffs and entrepreneurial contingency-fee counsel who seek enormous damages awards or lucrative settlements from corporate defendants that are "not 'at home' in California." *Daimler*, 134 S. Ct. at 751 (quoting *Goodyear*, 564 U.S. at 919). "The practical effect of the decision in the mass tort context . . . is that it sets a precedent for finding specific jurisdiction over any foreign corporation that sold, marketed, or distributed products nationally, even if the injuries giving rise to the claim occurred wholly outside the forum state." Jesse G. Ainlay & Elizabeth S. Dillon, *Examining the Ways That Plaintiffs Seek to Narrow Daimler v. Bauman*, For The Defense, Nov. 2016, at 55.

As Justice Werdegar's dissenting opinion explains, "[u]nder the majority's theory of specific jurisdiction, California provides a forum for plaintiffs from any number of states to join with California plaintiffs seeking redress for injuries from virtually any course of business conduct a defendant has pursued on a

nationwide basis, without any showing of a relationship between the defendant's conduct in California and the nonresident plaintiffs' claims." Pet. App. 84a-85a (Werdegar, J., dissenting). By asserting that a "claim need not arise directly from the defendant's forum contacts . . . to warrant the exercise of specific jurisdiction," *id.* at 22a (internal quotation marks omitted), the majority opinion flouts this Court's personal jurisdiction jurisprudence, going back to *International Shoe*. *See, e.g. Goodyear*, 564 U.S. at 919 ("Specific jurisdiction . . . depends on an *affiliatio[n] between the forum and the underlying controversy*, principally, activity or an occurrence that takes place *in the forum State* and is therefore subject to the State's regulation.") (internal quotation marks omitted) (emphasis added); Pet. App. 52a-53a (Werdegar, J., dissenting) (discussing the due process principles established by *Int'l Shoe*).

The majority opinion not only enables, but also invites, untold numbers of plaintiffs from around the United States—nonresidents who have suffered no injuries in or traceable to California—to band together in California state courts and pursue mass tort litigation against out-of-state defendants such as petitioner BMS here. *See, e.g.*, Pet. App. at 37a-39a, 41a-43a (discussing the supposed virtues of litigating in California). California's notion that its state courts should function as some sort of national forum for mass tort suits between out-of-state parties conflicts with what this Court has described as interstate federalism. *See World-Wide Volkswagen*, 444 U.S. at 293 ("[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain

faithful to the principles of interstate federalism embodied in the Constitution. . . . The sovereignty of each State . . . implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."); *see also* Pet. App. 82a (Werdegar, J. dissenting).

Authorizing vast numbers of nonresident plaintiffs (and their forum-shopping attorneys) to hale nonresident corporate defendants into California state courts by means of the extraordinarily over-inclusive specific jurisdiction theory at issue in this case also exacerbates the pro-plaintiff bias that already infects the State's judicial system. "Though California courts are already plagued with budget issues that have resulted in clogged dockets, courthouse construction projects being put on hold, and unfunded but needed judgeships . . . the state's judiciary continues incomprehensibly to roll out the red carpet for still more out-of-state plaintiffs – even those suing out-of-state defendants for alleged injuries that occurred outside California." American Tort Reform Foundation, "Judicial Hellholes," http://www.judicialhellholes.org/2016-2017/california.

"Loose jurisdictional rules that allow plaintiffs to choose among many potential courts give judges an incentive to be pro-plaintiff in order to attract litigation." Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. of Legal Analysis 245, 247 (2014). More specifically, "the fact that plaintiffs choose the most favorable forum may give some courts an incentive to make their laws, procedures, and institutions especially favorable to plaintiffs." *Id.* at

259. In other words, one "problem with forum shopping is that it can lead to 'forum selling,' the creation of excessively pro-plaintiff law by judges who want to hear more cases." *Id.* at 247. "Without constitutional constraints on assertions of jurisdiction, some courts are likely to be biased in favor of plaintiffs in order to attract litigation and thus benefit themselves or their communities." Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 243 (2016). Or some courts may seek to act as a national forum for mass tort suits in order to hold corporate defendants accountable for their nationwide promotion and distribution of allegedly defective products regardless of where the plaintiffs reside, and despite the total absence of case-specific forum contacts on the part of either the nonresident plaintiffs or the out-of-state defendant. "While only a few judges may be motivated to attract more cases, their actions can have large effects because their courts will attract a disproportionate share of cases." *Ibid.* "The danger of forum selling suggests" that due process "restrictions on state assertions of personal jurisdiction" provide "an important safeguard against biased judging." *Ibid.*

Deliberately or not, the California Supreme Court's majority opinion, in its effort to defend application of the sliding-scale approach, engages in a type of forum selling on behalf of that State's court system. The majority asserts, for example, that —

- Despite the out-of-state plaintiffs' diverse residences, "our State's Civil Discovery Act provides for taking depositions outside of California for use at trial, Pet. App. 38a;

- "BMS has provided no evidence to suggest that the cost of litigating plaintiffs' claims in San Francisco is excessive or unduly burdensome for BMS compared to any other relevant forum or forums," *ibid.*;

- California's interest "in providing a forum for both resident and nonresident plaintiffs . . . is further underscored by the substantial body of California law aimed at protecting consumers from the potential dangers posed by prescription medication, including warnings about serious side effects and prohibiting false and misleading labeling," *id.* at 39a; and

- "the current forum, the San Francisco Superior Court, is equipped with a complex litigation department that is well suited to expeditiously handle such large cases, *id.* at 41a.

Judicial efforts to justify sweeping assertions of personal jurisdiction over nonresident defendants by "selling" California state courts as a desirable forum for adjudicating nonresident plaintiffs' mass tort claims is troubling, including because, as discussed in the next section of this brief, the California state judicial system is decidedly pro-plaintiff. "Since impartial judging is a key Due Process concern, forum selling helps explain why restrictions on state assertions of personal jurisdiction are properly addressed by the Due Process Clause." Klerman & Reilly, *supra* at 243. Although the inequitable effects of forum shopping and forum selling "can be cured by constricting jurisdictional choice," *id.* at 247, the California Supreme Court's elastic view of specific personal jurisdiction points exactly in the opposite direction.

### B. California state courts do not provide a fair forum for adjudication of nationwide mass tort suits

The California Supreme Court's sliding-scale standard for specific jurisdiction tilts the scales of justice in favor of plaintiffs. Adopted more than twenty years ago by a unanimous court in *Vons Companies, Inc. v. Seabest Foods, Inc.*, 926 P.2d 1085 (Cal. 1996), *see* Pet. App. 32a, but now endorsed by only four of seven justices,[2] the sliding-scale approach—and the court's opinion in this case—have helped to keep California's state court system at the top of the American Tort Reform Foundation's annual list of the nation's worst "Judicial Hellholes." *See* http://www.judicialhellholes.org/about/ ("Judicial Hellholes have been considered places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits.").

For example, according to the Judicial Hellholes website, more than 2,900 pharmaceutical-related product liability suits were filed in Los Angeles and San Francisco state courts between January 2010 and May 2016. Of the more than 25,000 plaintiffs in those suits, 90% resided outside of California; in fact, two-thirds of the suits did not include *any* California residents. *See* http://www.judicialhellholes.org/2016-2017/california (citing and linking to Civil Justice League of California statistics).

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[2] Both Justice Werdegar, who authored the dissenting opinion in the present case, and Justice Chin, who joined the dissent, had concurred in *Vons*.

Along the same lines, year after year the U.S. Chamber of Commerce's Institute for Legal Reform ranks California's state liability system one of the very worst in the nation, surpassed only by Illinois, Louisiana, and West Virginia. *See Ranking the States, A Survey of the Fairness and Reasonableness of State Liability Systems*, U.S. Chamber Institute for Legal Reform (2015), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/ILR15077-HarrisReport_BF2.pdf. Participants in the Institute's "Lawsuit Climate Survey" were a national sample of knowledgeable senior executives, in-house general counsel, and senior litigators. *Id.* at 3. The Survey takes into account factors such as treatment of class action and mass consolidation suits, timeliness of summary judgment or dismissal, discovery, admissibility of scientific and technical evidence, damages, and judges' impartiality, competence, and fairness. *Id.* at 5. From the viewpoint of providing a fair judicial forum, California ranks dead last in adjudication of mass tort litigation. *Id.* at 14; *see also* Editorial, *California's litigious climate*, L.A. Daily News, Dec. 27, 2016 ("California's litigation climate remains one of the worst in the country.").

In addition to laying out a borderless jurisdictional welcome mat for out-of-state plaintiffs seeking to sue out-of-state companies, there are many other reasons why California's state courts are a plaintiff-friendly magnet that attracts forum shoppers in mass tort cases. For example—

- *Choice of Law.* California utilizes a subjective "governmental interest" approach under which

California law applies unless a California court determines that (i) there is a "'true conflict'" between "the governmental interests or purposes served by the applicable statute or rule of law of each of the affected jurisdictions," and (ii) another "jurisdiction's interests would be more severely impaired [than California's] if that jurisdiction's law were not applied." *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 917 (Cal. 2006); *see, e.g., Hurtado v. Superior Court*, 522 P.2d 666 (Cal. 1974) (California measure of damages applied in wrongful death action because other potentially concerned jurisdiction (Mexico) had no interest in having its own law applied).

- *Expert Opinion Testimony.* California trial courts are supposed to fulfill an expert testimony gatekeeper role. *See* Cal. Evid. Code §§ 801, 802. Nonetheless, the California Supreme Court continues to require state trial courts to apply the "general acceptance" test for admissibility of expert testimony concerning new scientific techniques despite this Court's rejection of that test for purposes of the Federal Rules of Evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See, e.g., People v. Lucas*, 333 P.3d 587, 662 n.36 (Cal. 2014); *Sargon Enterprises, Inc. v. Univ. of Southern Calif.*, 288 P.3d 1237, 1252 n.6 (Cal. 2012).

- *"Consumer Expectations" Liability.* California treats the "ordinary consumer expectations" test as an independent theory of liability, and rejects a more demanding "unreasonably dangerous" test, in design defect cases. *See Soule v. General Motors, Corp.*, 882 P.2d 298, 304 (Cal. 1994).

- *"Product Line" Liability.* Unlike most states, California imposes strict tort liability for defects in a predecessor manufacturer's product where the defendant has acquired the predecessor's business and continues the same product line. *See Ray v. Alad Corp.*, 560 P.2d 3 (Cal. 1977); *compare Semenetz v. Sherling & Walden, Inc.*, 851 N.E.2d 1170, 1175 (N.Y. 2006) (rejecting *Ray v. Alad* and joining "the majority of courts declining to adopt the 'product line' exception" to the general rule against successor liability).

- *Dissolved and Successor Corporation Liability.* Unlike the majority of states, California does not impose a statutory deadline for suing dissolved corporations. *Compare* Cal. Corp. Code § 2010 *with* Del. Code Ann. tit. 8, § 278 (allowing lawsuits until three years from date of dissolution). Further, a successor corporation can be liable for payment of punitive damages assessed against its predecessor. *See* Cal. Corp. Code § 1107.

- *Statute of Limitations.* The general 2-year statute of limitations for personal injury claims, Cal. Code Civ. Proc. § 335.1, is tolled by a 1-year discovery rule, *see* Cal. Courts, Statutes of Limitations, http://www.courts.ca.gov/9618.htm.

- *Trial-Court Procedures.* California's procedural rules work together to favor tort plaintiffs who want to press for an unreasonably accelerated trial and/or force a pretrial settlement. For example, California state trial courts can grant a motion for preference, thereby requiring a trial to commence within 120 days. *See* Cal. Code Civ. Proc. § 36(f). Such a motion can be granted not only at the request

of one or more plaintiffs who are under 14 or over 70 years of age, or terminally ill, *id.* §§ 36(a), (b) & (d), but also upon "a showing that satisfies the court that the interests of justice will be served" by an expedited trial. *Id.* § 36(e). If the defendant hopes to avoid trial by moving for summary judgment, it must wait at least 60 days from appearance of the opposing parties, and then provide at least 75 days advance notice of a summary judgment hearing that must be held at least 30 days before the case is set for trial. *See id.* § 437c(a). And despite these severe time constraints, a summary judgment motion "shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." *Id.* § 437c(b)(1). As a practical matter, these procedural rules often make it impossible for a defendant to pursue pretrial summary judgment.

The California Supreme Court's sliding-scale specific jurisdiction standard only exacerbates these and other pro-plaintiff features of the California judicial system.

## II. THE CALIFORNIA SUPREME COURT'S "SLIDING-SCALE" APPROACH TO SPECIFIC JURISDICTION OFFENDS DUE PROCESS

"The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear*, 564 U.S. at 923. More specifically, "[t]he Due Process Clause . . . constrains a State's authority to bind a nonresident defendant to a judgment of its courts." *Walden*, 134 S. Ct. at 1121. To ensure that the "exercise [of] personal jurisdiction over an out-of-

state defendant . . . does not offend 'traditional notions of fair play and substantial justice,'" *Goodyear*, 564 U.S. at 923 (quoting *Int'l Shoe*, 326 U.S. at 316), a state court "looks to the defendant's contacts with the forum State itself." *Walden*, 134 S. Ct. at 1122.

"A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 564 U.S. at 919 (quoting *Int'l Shoe*, 326 U.S. at 317). "In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (internal quotation marks omitted); *see also Walden*, 134 S. Ct. at 1121 ("The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation. . . . For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State.") (internal quotation marks omitted).

The California Supreme Court's majority opinion stretches specific jurisdiction so far, it "'has elided the essential difference between case-specific and all-purpose (general) jurisdiction.'" *Daimler*, 134 S. Ct. at 757 (quoting *Goodyear*, 564 U.S. at 927); *see* Pet. App. 50a (Werdegar, J., dissenting) ("[T]he majority expands specific jurisdiction to the point that, for a

large category of defendants, it becomes indistinguishable from general jurisdiction."). This Court explained in *Daimler* that "general jurisdiction has come to occupy a less dominant place in the contemporary scheme," unlike specific jurisdiction, which "has become the centerpiece of modern jurisdiction theory." *Daimler*, 134 S. Ct. at 755, 758 (internal quotation marks omitted). The majority opinion's sliding-scale approach to specific jurisdiction, however, "appears to reintroduce general jurisdiction by another name." Linda J. Silberman, *The End of Another Era: Reflections On Daimler and Its Implications For Judicial Jurisdiction In the United States*, 19 Lewis & Clark L. Rev. 675, 687 (2015) (discussing the California Court of Appeal opinion affirmed by the California Supreme Court in this case); *see also* Pet. App. 50a-51a (Werdegar, J., dissenting) ("What the federal high court wrought in *Daimler*—a shift in the general jurisdiction standard from the 'continuous and systematic' test of *Helicopteros* to a much tighter 'at home' limit—this court undoes under the rubric of specific jurisdiction.").

In so doing, the majority opinion violates the due process principles upon which this Court's personal jurisdiction jurisprudence is founded. The majority's assertion that its "decision does not render California an all-purpose forum" for out-of-state tort plaintiffs, Pet. App. 35a, rings hollow. According to the majority's wide-ranging view of specific jurisdiction, California state courts can exercise personal jurisdiction over virtually any company that engages in a "nationwide marketing, promotion, and distribution" of a drug or other product, *id.* at 28a,

despite the absence of any causal connection between the nonresident plaintiffs' claims and the company's California-specific activities. The majority contends that "a single, coordinated, nationwide course of conduct" directed from other states, *id.* at 29a-30a, is adequate to establish a "substantial nexus or connection" with California to satisfy "the relatedness requirement for specific jurisdiction." *Id.* at 21a (internal quotation marks omitted). Importantly, the majority also insists that a defendant's California-specific contacts *need not* "bear some substantive legal relevance to the nonresident plaintiffs' claims." *Id.* at 30a.

This overreaching approach turns specific jurisdiction on its head. "Adjudicatory authority is 'specific' when the suit 'aris[es] out of or relate[s] to the defendant's contacts *with the forum*.'" *Goodyear*, 564 U.S. at 923-24 (quoting *Helicopteros*, 466 U.S. at 414 n.8) (emphasis added). But under the majority's subjective sliding-scale standard, "the intensity of forum contacts and the connection of the claims to those contacts is *inversely* related": "[T]he more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." Pet. App. 22a (internal quotation marks omitted) (emphasis added). In other words, the majority viewed a defendant's *non*-case-specific contacts with a forum state—for example, nationally uniform product promotion and distribution—as a substitute for an actual, substantial connection between nonresident plaintiffs' claims and a nonresident defendant's forum-specific activities. This inverted logic defies

the due process precepts that underlie this Court's specific jurisdiction case law.

The unfairness of the state supreme court's inverse sliding scale demonstrates why it undermines this Court's personal jurisdiction jurisprudence, which is *predicated* on "compatibility with the Fourteenth Amendment." *Goodyear*, 564 U.S. at 918. For example, unless this Court unequivocally rejects California's sliding-scale approach on the ground that it exceeds the bounds of due process, it will fit within every state long-arm statute which, like California's, broadly enables state courts to "exercise jurisdiction on any basis not inconsistent with the Constitution." Cal. Code Civ. Proc. § 410.10. *Every* such state then would be able not only to entertain, but also vie for, nonresident plaintiffs' mass tort suits against nonresident defendants merely because a company markets and distributes an allegedly defective product nationally. Such "[j]urisdictional competition" among state judicial systems "is very likely to be bad," including because, as discussed above, "[p]ersonal jurisdiction rules that give plaintiffs' substantial choice of forum encourage pro-plaintiff bias." Klerman & Reilly, *supra* at 244; Klerman, *supra* at 248. California's state courts already suffer from plenty of that.

## CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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March 2017

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FILED
MAR - 8 2016
OFFICE OF THE CLERK

No. 16-466

In the

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

PETITIONER,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

RESPONDENTS.

**On Writ of Certiorari to the California Supreme Court**

## BRIEF OF *AMICUS CURIAE* GLAXOSMITHKLINE LLC IN SUPPORT OF PETITIONER

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March 8, 2017

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## INTEREST OF AMICUS CURIAE[1]

Amicus curiae GlaxoSmithKline LLC ("GSK") is a pharmaceutical company that researches and develops medicines, vaccines, and consumer healthcare products. GSK is a Delaware limited liability company with large corporate/administrative headquarters in Pennsylvania and North Carolina. Its sole member is GlaxoSmithKline Holdings (Americas) Inc., a Delaware corporation with its principal place of business in Delaware.

Like petitioner, GSK is often targeted by plaintiffs' lawyers seeking to bring mass-tort lawsuits in jurisdictions of their choosing. The lawyers select forums that they believe are favorable, regardless of where their clients reside or where their clients were prescribed the medication that forms the basis of the suit. The lawyers then join together dozens or even hundreds of plaintiffs, most of whom have no connection with the chosen forum, to bring claims that also have nothing to do with the forum. As a result, GSK is forced to defend cases in states where it has little or no presence, where key witnesses are often unavailable to testify in person at trial, and where it is often unclear which state's law applies.

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[1] Petitioner and respondents have filed blanket consent letters with the Court. Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part and that no person or entity other than amicus and its counsel contributed monetarily to its preparation or submission.

GSK supports petitioner because the California Supreme Court's "sliding-scale" approach to personal jurisdiction enables blatant forum shopping, inappropriately burdens defendants, courts, and witnesses, and cannot be squared with this Court's due process jurisprudence.

The Court has recognized two categories of personal jurisdiction: general and specific. Under general jurisdiction, a defendant is subject to suit on any cause of action, even claims unrelated to the defendant's forum-state contacts, but only in forums where the defendant is incorporated or maintains its principal place of business and thus is "at home." Specific jurisdiction permits suit to be brought in a state where the defendant is not at home, but only when the claim itself is tied to the defendant's forum-state contacts. California's sliding-scale approach effectively would create a third category of personal jurisdiction, where neither basis for jurisdiction under this Court's precedents is satisfied—the defendant is not at home in the plaintiff's chosen forum, and the claim is not meaningfully tied to the forum—but where jurisdiction is somehow nonetheless permitted if the court thinks that result is reasonable. That relaxed and malleable approach to the fundamental question of a court's power guts important due process protections and ignores this Court's admonitions that the personal-jurisdiction doctrine is designed to allow defendants to predict and even control where they are subject to suit.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Three years ago, in *Daimler AG v. Bauman*, the Court held that a corporation is subject to general jurisdiction only where it is "at home," which typically means "where it is incorporated or has its principal place of business." 134 S. Ct. 746, 751, 760 (2014). Before *Daimler*, some courts had found general jurisdiction everywhere the defendant had "continuous and systematic" contacts, which amounted to universal general jurisdiction for large companies with nationwide operations. *See id.* at 761. *Daimler* explicitly rejected that standard and the "exorbitant exercises of all-purpose jurisdiction" that had been permitted under it. *Id.*

Under *Daimler*'s direct compulsion, the California Supreme Court acknowledged that petitioner is not "at home" in California and therefore not subject to general jurisdiction there. But the majority then emptied that holding of all its significance. Invoking the same "continuous and systematic" contacts that are concededly not enough for *general* jurisdiction, the majority found them sufficient for *specific* jurisdiction. It did so by loosening the "arising from" requirement—which is supposed to distinguish specific from general jurisdiction—until specific jurisdiction is no longer specific to the plaintiff's claim and is really general jurisdiction by another name.

The court below thus effectively reinstated the theory of personal jurisdiction that this Court rejected. Under the decision below, a company with nationwide operations is subject to "specific"

jurisdiction virtually anywhere on virtually any claim. But there is something obviously wrong with a theory of "specific" jurisdiction that permits universal general jurisdiction. As the dissent observed, "[w]hat the federal high court wrought in *Daimler*—a shift in the general jurisdiction standard from the 'continuous and systematic' test of *Helicopteros* to a much tighter 'at home' limit—this court undoes today under the rubric of specific jurisdiction." Pet. App. 50a–51a (Werdegar, J., dissenting).

The California Supreme Court's "sliding-scale" approach further encourages plaintiffs' lawyers to assemble mass-tort actions of national scope in their favored jurisdictions, without regard to whether the claims have a meaningful nexus to the forum. GSK is already facing many such suits across the country, including in Missouri, California, and Illinois. In those cases, plaintiffs' lawyers use one or a few in-state plaintiffs as the key to unlock the courthouse doors for dozens of non-resident plaintiffs. GSK's experience is far from unique. Plaintiffs' lawyers target many other companies with the same types of lawsuits, with the result that a few plaintiff-chosen jurisdictions host a highly anomalous concentration of these claims. These jurisdictions are attractive to plaintiffs because of perceived favorable evidentiary and discovery rulings, because of juries that they believe are more likely to award large verdicts, and because aggregating large numbers of plaintiffs makes it difficult if not impossible for defendants to defend each claim on its merits.

As this Court has explained, such "exorbitant" exercises of personal jurisdiction "are barred by due process constraints on the assertion of adjudicatory authority." *Daimler*, 134 S. Ct. at 751. When a state court reaches out to decide a dispute that arose in a different state, the defendant will have trouble obtaining testimony from the most important witnesses. State courts generally lack subpoena power outside the state's borders, making it difficult or impossible for defendants to obtain live trial testimony from critical witnesses like the prescribing physician. The defendant's attorneys often have to settle for taking an out-of-state deposition that doubles as both a discovery and a cross-examination deposition and then trying to splice together a video to present at trial. The result is an awkward presentation that lacks the force of a live cross-examination and that bears little resemblance to "the time-honored process of cross-examination as the device best suited to determine the trustworthiness of testimonial evidence." *Watkins v. Sowders*, 449 U.S. 341, 349 (1981). Moreover, without the ability to compel these witnesses to testify at trial, the defendant cannot question them about any opposing expert opinions disclosed at or near trial or otherwise tailor their examination to what occurs at trial.

The California Supreme Court's decision is also contrary to basic principles of federalism. A state should not want to require its citizens to serve as jurors—in trials that can last weeks—to adjudicate disputes that lack any meaningful connection to the state. But regardless of a state's wishes, a state lacks the constitutional authority to declare itself the hub of a nationwide multi-district litigation, reaching

out to decide controversies that properly belong in other states.

What is more, the decision below complicates mass-tort litigation by sometimes creating difficult choice-of-law issues. When the plaintiff, the defendant, and the injury are all out of state, a court must decide whether to apply the substantive law of the state where the claim arose (often but not necessarily the plaintiff's home state) or that of the forum state. These issues make dispositive-motion practice and the development of jury instructions more convoluted, creating more opportunities for error.

The Court should put an end to this inappropriate forum shopping by holding that a plaintiff must show a relationship of proximate causation between the defendant's forum-state contacts and the plaintiff's injuries. The California Supreme Court's holding that no causal relationship is required blends the required specific jurisdiction analysis into an amorphous "reasonableness" soup. And because but-for causation lacks a limiting principle, a but-for causation standard would be nearly as indeterminate as the California Supreme Court's avowedly non-causal standard. The proximate-cause standard, in contrast, properly addresses the fairness, predictability, and federalism concerns that animate personal jurisdiction jurisprudence.

## ARGUMENT

Using the decision below and others with similar reasoning, plaintiffs' lawyers have engaged in blatant

forum shopping. Lawyers select jurisdictions not meaningfully related to their clients' claims, because they believe that those jurisdictions have favorable judges and juries willing to award large verdicts. By authorizing litigation in jurisdictions far from where the relevant events occurred, the California Supreme Court's approach imposes significant burdens on defendants, courts, and witnesses. The Court should adopt a proximate-causation standard to protect the core principles of fairness, predictability, and federalism that underpin personal jurisdiction jurisprudence.

## I. The Decision Below Invites Gamesmanship By Plaintiffs' Lawyers.

The malleable, non-causal standard adopted by the California Supreme Court authorizes—indeed, rewards—plaintiffs' lawyers' tactic of concentrating cases in plaintiff-friendly jurisdictions even where their clients' claims have no connection to the chosen forum. The decision below blesses a legal landscape where a few jurisdictions—notably, Missouri, California, and Illinois—are serving as the effective hubs of nationwide mass-tort actions, even though those jurisdictions have virtually no connection to the cases they are hosting.

### A. GSK Is Defending Hundreds of Claims in Missouri, California, and Illinois That Do Not Arise Out of GSK's Contacts With Those States.

GSK is at ground zero of this forum-shopping epidemic. In mass-tort suits around the country, plaintiffs' lawyers are recruiting a few in-state

plaintiffs to use as anchors to bring large numbers of claims by out-of-state plaintiffs in the lawyers' preferred jurisdictions.

In Missouri, for example, 96 plaintiffs whose claims have no connection to Missouri joined with a mere three in-state plaintiffs to bring a mass action in St. Louis. *See Fitts, et al. v. GSK*, Cause No. 1622-CC00539 (22nd Jud. Cir. Ct., City of St. Louis).[2] The plaintiffs are mother-child pairs who allege that the unborn children were injured when their mothers ingested Paxil, a drug that is FDA-approved to treat depression, obsessive-compulsive disorder, and anxiety. The 96 out-of-state plaintiffs reside in 30 different states. The trial court asserted personal jurisdiction as to the out-of-state plaintiffs' claims on the bizarre rationale that the *plaintiffs* had "consented to personal jurisdiction" and GSK's agent had been served in Missouri—skipping entirely over the question whether the nexus required by due process existed between the out-of-state plaintiffs' claims and GSK's Missouri contacts. *Fitts*, Order at 2-3 (Nov. 9, 2016).[3] In a similar case, not

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[2] It is not a coincidence that the total number of plaintiffs is precisely 99, as the Class Action Fairness Act permits removal to federal court of a "mass action" containing 100 or more plaintiffs. *See* 28 U.S.C. § 1332(d)(11).

[3] GSK's petition for a writ of prohibition was denied by the Missouri Court of Appeals and is now pending in the Missouri Supreme Court. *See* GSK's Pet. Writ Proh., *State ex rel. SmithKline Beecham Corp. v. Moriarty*, No. ED105081 (Mo. App. E.D. filed Dec. 8, 2016), *denied*, (Dec. 9, 2016); GSK's Pet. Writ Proh., *State ex rel. SmithKline Beecham Corp. v. Moriarty*, No. SC96133 (Mo. filed Dec. 29, 2016).

coincidentally also filed in St. Louis, 61 non-Missouri plaintiffs combined their claims with those of four Missouri residents. *See Orrick v. GSK*, Cause No. 1322-CC00079-01 (22nd Jud. Cir. Ct., City of St. Louis).

California is another attractive destination for plaintiffs' lawyers. Although GSK is not "at home" in California under *Daimler*, out-of-state plaintiffs have filed 13 suits against GSK in California state courts over the past four years. Those complaints name 27 California residents and 31 non-California residents as plaintiffs. The non-California plaintiffs live in states all over the country, including Illinois, Pennsylvania, Kentucky, New Hampshire, Oklahoma, Michigan, Missouri, Arizona, Wisconsin, Wyoming, Louisiana, Texas, and Mississippi. They do not allege that their physicians prescribed Paxil in California, that the plaintiffs ingested Paxil in California, or any other facts linking their claims to California. Instead, like respondents here, they argue that personal jurisdiction is proper simply because GSK marketed and sold Paxil in California as a general matter—in-state sales that potentially give rise to claims by *other* plaintiffs, but not their own claims. The trial court invoked the California Supreme Court's decision and denied GSK's motion to quash. *See* Order Denying Defendant GlaxoSmithKline, LLC's Motion to Quash for Lack of Personal Jurisdiction of Non-California Plaintiffs, *Paxil II Product Liability Cases*, JCCP 4786 (Nov. 4, 2016). GSK's petition for a writ of mandate is pending. *See GlaxoSmithKline LLC v. Superior Court*, No. B279328 (Cal. Ct. App.).

Plaintiffs' attorneys also perceive Illinois as a favorable jurisdiction. There, six mother-child pairs from Florida, Colorado, Virginia, Michigan, and Wisconsin used one pair from Illinois as an anchor to sue GSK in the Circuit Court of Cook County. *See Meyers, et al. v. GlaxoSmithKline LLC*, 2016 IL App (1st) 151909, *leave to appeal denied* (Ill. Nov. 23, 2016). Lacking confidence in the theory endorsed by the court below, the out-of-state plaintiffs relied on a twist: They contended that their claims arose out of GSK's worldwide clinical trial program for Paxil. That program had only the most miniscule connection to Illinois: 95 percent of the over 300 clinical trials did not have even a single study site or investigator in Illinois, and even the few trials that had a site in Illinois had the vast majority of their sites elsewhere. And the plaintiffs did not allege that their claims had anything to do with the tiny portion of the clinical trial program that occurred in Illinois. Nonetheless, the trial court and the Illinois Appellate Court thought it was enough that the data from the handful of Illinois study sites—in the handful of trials that had even one Illinois site—was "aggregated" with the data GSK collected across the country and around the world. 2016 IL App (1st) 151909, at ¶ 52. Under that loose approach to the "arising from" requirement, GSK would be subject to specific jurisdiction essentially everywhere on essentially any claim.[4]

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[4] GSK intends to petition for certiorari in *Meyers* to ask the Court to resolve the split over but-for versus proximate causation, if the Court does not resolve that question in this

Plaintiffs' lawyers seek out what they refer to as "favorable jurisdictions" advisedly. William Cash, *Is It Time to Rethink the MDL for Mass Tort Cases?* The Trial Lawyer Magazine (Sept. 2015), *available at* http://www.thenationaltriallawyers.org/2015/09/rethink-the-mdl-for-mass-tort-cases/. Plaintiffs' lawyers believe that they can obtain favorable discovery and evidentiary rulings in these courts. And they consider the jury pools to be optimal. "It is certainly fair to summarize all of this by saying that juries in California put a higher value on personal injury cases than the average American does." Ronald V. Miller, Jr., "Average Injury Verdicts in California," Accident Injury Lawyer Blog (Dec. 15, 2010), *available at* http://www.accidentinjurylawyerblog.com/2010/12/average_injury_verdicts_in_cal.html.

Other lawyers are even more explicit. "What I call the 'magic jurisdiction' [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges . . . and it's almost impossible to get a fair trial if you're a defendant in some of these places. . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is." Richard "Dickie" Scruggs, Asbestos for Lunch, panel discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in INDUSTRY COMMENTARY (Prudential Securities, Inc., New York), June 11, 2002, at 5.

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case. *See GlaxoSmithKline LLC v. M.M., et al.*, No. 16A806 (Feb. 10, 2017 order extending time for petition until March 23).

### B. GSK's Experience Is Illustrative.

GSK's experience is a microcosm of a larger forum-shopping problem involving many other non-resident defendants. In recent years, for example, plaintiffs' lawyers have repeatedly sued Johnson & Johnson in Missouri about alleged risks posed by talcum powder. *See, e.g., Timms v. Johnson & Johnson*, No. 4:16-cv-00733-JAR, 2016 WL 3667982 (E.D. Mo. Jul. 11, 2016) (remanding action to City of St. Louis Circuit Court and denying motion to dismiss for lack of personal jurisdiction in action involving 80 unrelated plaintiffs from 31 states, with only three from Missouri); *Swann v. Johnson & Johnson*, No. 4:14-cv-1546 CAS, 2014 WL 6850776 (E.D. Mo. Dec. 3, 2014) (remanding action involving 62 plaintiffs from 27 different states to City of St. Louis Circuit Court).

Missouri is also hosting dozens of lawsuits by out-of-state plaintiffs against Pfizer involving the prescription drug Zoloft. *See Robinson v. Pfizer Inc.*, No. 4:16-CV-439 (CEJ), 2016 WL 1721143 (E.D. Mo. Apr. 29, 2016) (remanding action brought by 64 plaintiffs from 29 different states to City of St. Louis Circuit Court); *see also In re Zoloft (Sertraline Hydrochloride) Prod. Liab. Litig.*, MDL No. 2342, 2015 WL 12844391 (E.D. Pa. Nov. 17, 2015) (remanding complaint involving 41 plaintiff families from 29 different states originally filed in City of St. Louis Circuit Court). General Motors, too, is litigating a case in Missouri state court related to allegedly defective ignition switches in which 28 plaintiffs from 15 different states joined with one who was allegedly injured in Missouri. *See Shell, et*

*al. v. General Motors*, No. 1522-cc00346 (22nd Jud. Cir. Ct., City of St. Louis); *see also State of Missouri ex rel. General Motors, LLC v. The Honorable David W. Dowd*, No. SC95385 (Mo. Sup. Ct. Nov. 30, 2015) (denying writ of prohibition).[5]

Janssen Pharmaceuticals is also facing a mass-tort action of national scope in state court in St. Louis. *See Allen et al. v. Janssen Pharm. et al.*, No. 1522-CC00187-01 (22nd Jud. Cir. Ct., City of St. Louis Nov. 9, 2016) (denying motion to dismiss for lack of personal jurisdiction in suit involving 64 plaintiffs from 30 different states). And Abbott Laboratories is defending litigation in St. Louis involving Depakote brought by 24 plaintiffs from 13 different states. *See Barron, et al. v. Abbott Labs. Inc.*, No. 1222-cc02479-01 (22nd Jud. Cir. Ct., City of St. Louis).[6] As suggested by the decision below, California is hosting many similar cases as well. Between 2010 and 2016, plaintiffs' lawyers filed thousands of cases in state court in California involving tens of thousands of plaintiffs, with 89.9

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[5] *See also Felix et al. v. General Motors, LLC*, No. 1422-cc09472 (22nd Jud. Cir. Ct., City of St. Louis) (filed Aug. 20, 2014); *Alden et al. v. General Motors LLC*, No. 1522-CC09842 (22nd Jud. Cir. Ct., City of St. Louis) (filed June 5, 2015).

[6] The Missouri Court of Appeals initially affirmed a plaintiff's judgment but then transferred the case to the Missouri Supreme Court, where it is pending. *See* No. ED103508 (Mo. App. E.D. Jan. 9, 2017).

percent of the plaintiffs residing outside of California.[7]

Because trials in cases like this happen one by one, the few in-state plaintiffs' claims may never be litigated—further confirming that the in-state plaintiffs serve only a forum-shopping purpose. The St. Louis trials in the talc cases, for example, involved plaintiffs from Alabama, South Dakota, and California. *See Hogans et al. v. Johnson & Johnson et al.*, No. 1422-CC09012-01 (22nd Jud. Cir. Ct., City of St. Louis Jan. 7, 2016). And in the Missouri Paxil cases, the first case set for trial involved a plaintiff from West Virginia. When a state court hosts what amounts to a nationwide multi-district litigation in which in-state plaintiffs barely participate, that is a sure sign that something is amiss.

## II. The California Supreme Court's Approach Creates Practical Difficulties for Defendants, Courts, and Witnesses.

### A. The Decision Below Is Contrary to Principles of Federalism and Due Process.

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). These

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[7] *See* Executive Summary: Are Out of State Plaintiffs Clogging California Courts?, Civil Justice Association of California (2016), *available at* http://cjac.org/what/research/CJAC _Out_of_ State_Plaintiffs_Exec_Summary.pdf.

constitutional limits "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum." *Id.* at 292.

The decision below disregards these principles and exposes defendants to exactly the burdens that the Due Process Clause is meant to prevent. The most obvious problem is how to obtain live trial testimony from out-of-state witnesses, such as the plaintiff's doctors, family, friends, and co-workers. This is particularly problematic when it comes to the prescribing physician, who is typically a key witness. That doctor will testify about why she prescribed the drug, whether a different warning would have changed her treatment recommendation, and what the drug was intended to treat. Under the learned intermediary doctrine, moreover, a manufacturer fulfills its duty to warn by advising the prescribing physician of the risks, meaning that the physician's testimony can be crucial. *See, e.g., Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966); *Hansen v. Baxter Healthcare Corp.*, 764 N.E.2d 35, 42 (Ill. 2002) (manufacturers of prescription drugs need not warn patients directly, but must "warn prescribing physicians . . . of the product's known dangerous propensities").

But getting the doctor's testimony is a tricky endeavor. Doctors generally do not jump at the opportunity to testify, particularly far from home. And defendants cannot force them to do so, because state courts lack the power to compel out-of-state witnesses to attend trial. *See, e.g., Gridley v. State Farm Mut. Ins. Co.*, 840 N.E. 2d 269, 279 (Ill. 2005) ("Illinois courts do not have subpoena power in

Louisiana, so . . . State Farm would not be able to compel the attendance of the Louisiana witnesses in Illinois.").

In practice, then, the defendant will depose the doctor in her home state. That is not a simple process. The defendant often must ask the court in the plaintiff's chosen forum to authorize the taking of the foreign deposition.[8] Then, the defendant often hires a local lawyer in the physician's state and files a separate lawsuit in a local court to obtain the foreign jurisdiction's authorization to take the deposition.

At the deposition, the defendant faces a strategic dilemma. The defendant cannot compel the doctor to appear at trial, so a video recording of the deposition may be the only way to present the doctor's testimony to the jury. But the defendant's attorney has not spoken with the doctor, because most states do not allow ex parte discussions by defense counsel with a plaintiff's doctor. As a result, the defendant does not know what the doctor is going to say.

So the defendant has two unpalatable choices. It can combine a discovery and a cross-examination deposition into one, requiring defense counsel to artfully begin with open-ended questions and then close things off with cross-examination questions developed on the spot. Then, the defendant can splice together the deposition clips, producing a disjointed and awkward presentation. Or the

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[8] *See, e.g.*, Commission to Take Deposition Outside California, http://www.courts.ca.gov/documents/disc030.pdf.

defendant can try to depose the doctor twice, if the defendant can persuade the forum state's court and the local court to allow it (a difficult thing to do).

In either event, the jury is deprived of the benefit of live testimony. And the defendant is denied the opportunity to prepare and deliver an effective cross-examination—"[t]he age-old tool for ferreting out truth in the trial process." *Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989). Instead, the judge turns down the lights, the screen comes on, and the jurors nod off. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants."). In an effort to liven things up, two attorneys will sometimes role-play by reading the deposition transcript aloud. Apart from being nearly as sleep-inducing as playing the video, this creates its own problems, because the jury is viewing the lawyers' demeanor instead of the witness's. More substantively, without witnesses actually present, the defendant cannot ask them questions tailored to what has occurs at trial. If a plaintiff's expert testifies at trial that the defendant should have published a particular warning, for example, the defendant cannot ask the prescribing physician if such a warning would have changed her decision to prescribe the medication.

An example from the *Orrick* case in Missouri (*see supra* at 9) illustrates this problem. As explained, that case involved a large number of out-of-state plaintiffs who used a handful of Missouri plaintiffs as

1036, 1050 (2016), the Court acknowledged the "great importance" of the question whether uninjured plaintiffs (who could not presumably sue on their own) could recover in a class action. See also *id.* at 1053 (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.").

These principles—rooted in due process—apply irrespective of whether it is thought to be more "efficient" (Pet. App. 39a) to join claims together in a single lawsuit, or a single forum. Due process calls for the balance between fundamental fairness and efficiency to be struck in favor of the former, not the latter. As this Court has put it in another context, "Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person" whose rights are at stake. *Fuentes* v. *Shevin*, 407 U.S. 67, 92 n.22 (1972); cf. also, *e.g.*, *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency.") (footnote omitted).

Certainly out-of-State plaintiffs have ample forums available in which to bring their claims, including the States in which petitioner is subject to general jurisdiction and those where the alleged injuries occurred. Whatever "efficien[cy]" is gained by allowing them to sue in California is far outweighed by the unfairness of subjecting petitioner to specific jurisdiction on claims that have nothing to do with the State.

quantum of . . . activity' having no connection to any in-state activity.").

The decision below also improperly burdens the California courts and the California citizens who would be called upon to serve as jurors—not to mention the California citizens whose cases are delayed because the courts are clogged with out-of-state matters. The typical pharmaceutical product-liability trial lasts three weeks or more, and "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil*, 330 U.S. at 508–09. That should be California's view too. But even if California (or Missouri or Illinois) wishes to burden its citizens in this manner, a state lacks the constitutional authority to effectively designate itself the hub of a nationwide multi-district litigation so it can adjudicate claims where the plaintiff, the defendant, the defendant's challenged conduct, and the claimed injury are all out of state.[9]

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[9] The doctrine of forum non conveniens is not an adequate substitute for the due process protections embodied in this Court's personal jurisdiction jurisprudence. Unlike the decision whether to dismiss for lack of personal jurisdiction, a forum non conveniens determination "is committed to the sound discretion of the trial court." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994); *see also, e.g., Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 751 (1991) ("Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise . . . jurisdiction . . . .").

### B. The Decision Below Also Creates Choice-of-Law Problems.

Aside from the due process and federalism problems discussed above, the decision below often forces judges to learn and apply the laws of jurisdictions other than their own. When a plaintiff resides out of state and suffered her alleged injuries out of state, the forum court must wrestle with what state's law governs. For example, if the plaintiff lives in Mississippi and her claim arose there, does the forum court apply Mississippi substantive product-liability law? No clear legal rule always dictates the answer to that question. In California, if there is a conflict between state laws, "the court analyzes the jurisdictions' respective interests to determine which jurisdiction's interests would be more severely impaired if that jurisdiction's law were not applied in the particular context presented by the case." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 100 (2006); *cf. BMW of N. Am, Inc. v. Gore*, 517 U.S. 559, 602 (1996) (Scalia, J., dissenting) (noting the "'interest analysis' that has laid waste the formerly comprehensible field of conflict of laws"). In cases with plaintiffs who reside in dozens of different states, the difficulties can sometimes multiply exponentially.

Different and sometimes conflicting state laws can dramatically change the scope and complexity of the case and the issues that are litigated. For example, unlike in California, Mississippi's Product Liability Act expressly subsumes common-law claims, leaving plaintiffs with a statutory cause of action only. *See* Miss. Code. Ann. § 11-1-63. In

Pennsylvania, a plaintiff must prove punitive damages by a preponderance of the evidence; in Mississippi, clear and convincing evidence is required. *Compare Sprague v. Walter*, 656 A.2d 890, 923 (Pa. Super. 1995), *with Muirhead v. Cogan*, 158 So. 3d 1259, 1266 (Miss. Ct. App. 2015). In North Carolina, a plaintiff's contributory negligence (of any degree) deprives the plaintiff of the right to recover. *McCauley v. Thomas ex rel. Progressive Universal Ins. Co.*, 774 S.E.2d 421, 426 (N.C. Ct. App. 2015). But not in California. *Harb v. City of Bakersfield*, 233 Cal. App. 4th 606, 626 (2015), *review denied* (Cal. Apr. 29, 2015).

After deciding what law to apply, the parties and the court must develop jury instructions. This often happens in the charged and frantic atmosphere of trial, as attorneys must haggle over and turn a foreign jurisdiction's law into a format accessible to a jury. The foreign jurisdiction sometimes has no pattern jury instructions to rely on. And even when it does, the parties and the court often must splice together the foreign jurisdiction's substantive law with the forum state's procedural law. It is no surprise that error often occurs. For these reasons, "[t]here is an appropriateness . . . in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of

laws, and in law foreign to itself." *Gulf Oil*, 330 U.S. at 509.[10]

## III. The Court Should Hold That a Proximate Causal Relationship Is Required.

Petitioner's brief correctly explains why the California Supreme Court's amorphous sliding-scale approach is inconsistent with this Court's precedents and an invitation to abuse. In its place, the Court should adopt the proximate-causation standard.

### A. The Court Should Reject the California Supreme Court's Nebulous Approach.

The sliding-scale approach "inappropriately blurs the distinction between specific and general personal jurisdiction." *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (Gorsuch, J.). While general jurisdiction does not require that the claim bear a relationship to the defendant's forum-state contacts, specific jurisdiction "is premised on something of a *quid pro quo*: in exchange for 'benefitting' from some purposive conduct directed at the forum state, a

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[10] Even if the forum ostensibly defers by applying the law where each claim arose, its interpretation and application of that foreign law could interfere with the development of the law in the state where the claim arose. A California court's view of (say) North Carolina law is of course not binding on North Carolina courts. But if California can invite and seize control over an entire class of claims from across the country, "North Carolina law" as a practical matter will be made by California courts, with North Carolina's own courts rarely having an opportunity to weigh in.

party is deemed to consent to the exercise of jurisdiction for claims related to those contacts." *Id.* California's sliding scale, however, "varies the required connection between the contacts and the claims asserted based on the number of the contacts" and therefore "improperly conflates these two analytically distinct approaches to jurisdiction." *Id.*

As petitioner explains, the decision below circumvents *Daimler* and *Goodyear* by returning to the old, rejected general jurisdiction standard in the guise of specific jurisdiction. Under the sliding scale, substantial and continuous contacts, though no longer sufficient to openly exercise general jurisdiction, somehow justify lowering the standard normally required for specific jurisdiction. What makes "specific" jurisdiction specific, however, is the nexus to the specific claim at hand. If no causal nexus to that claim is required—if it is sufficient that the claim *resembles* claims that arise out of the defendant's California contacts—then what is being exercised should be called by its true name: universal general jurisdiction for large corporations with nationwide operations. To the extent the decision below merely recycles the old standard for general jurisdiction under a different label, the Court should not tolerate such circumvention of its precedent.

But even if the court below is understood to have invented a new, third type of jurisdiction that is neither general nor specific, the court had no warrant to do so. And if nothing else is clear about the sliding scale, it is clear that it "undermines the rationale for the relatedness inquiry: to allow a defendant to anticipate his jurisdictional exposure based on his

own actions." *Id.* at 1079. If specific jurisdiction's relatedness requirement does not require a causal connection, then its meaning is entirely in the eye of the beholder; the sliding scale is an inkblot, not a standard. *See* Pet. Br. 20.

Indeed, the California Supreme Court's opinion suggests that it intended to subordinate predictability to what it viewed as reasonableness in result. Petitioner pointed out the lack of any valid interest for California, as one among 50 states, to adjudicate claims of out-of-state plaintiffs, against an out-of-state defendant, based on out-of-state conduct. As explained above, each state's limited role in our federal system is an important element of personal jurisdiction jurisprudence. *See supra* at 18–19. But the court below viewed these objections not just as unpersuasive, but as misplaced. Rather than address these issues about California's constitutional role in the context of the key question of "whether the contested claims arise from or relate to [petitioner's] forum activities," the court below shunted them off to an even more amorphous "consideration of whether the exercise of specific jurisdiction is reasonable." Pet. App. 36a.

The court below thus dissolved what is supposed to be a predictable, causation-based standard—an actual standard, with real content, and with the burden squarely on the plaintiff—into a hazy "reasonableness" multi-factor balancing framework with the burden on the defendant. This Court has made clear that "reasonableness" is not the standard the plaintiff must satisfy to justify specific jurisdiction. Instead, it is a safety valve for unusual

cases where the plaintiff satisfies the test for specific jurisdiction but exercising jurisdiction is nonetheless unreasonable under the circumstances. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985). It makes sense to reserve such a holistic (and therefore unpredictable) analysis for use as a defense in unusual cases. But the California Supreme Court improperly transformed that safety-valve defense into the personal jurisdiction standard itself.

That is radical and pernicious. The Court need look no further than the decision below for proof that a "reasonableness" analysis is no substitute for enforcement of a clear proximate-cause standard. The court below acknowledged that "[p]retrial preparation and discovery concerning plaintiffs' claims may pose challenges given the diversity of their states of residence." Pet. App. 38a. But the court then found that petitioner had failed to show that those challenges would be an "undue burden," Pet. App. 139a— "whatever that means" (Pet. Br. 20). The court also allowed that "the fact that the nonresident plaintiffs greatly outnumber the California plaintiffs does give us some pause." Pet. App. 39a. But it then reassured itself that the number of out-of-state plaintiffs did not change the result because "no one factor, by itself, is determinative." *Id.* In finding that the assertion of jurisdiction was reasonable, the court also relied on unspecified "overall savings of time and effort to the judicial system" and "concerns of delay and efficiency" in "the interstate judicial system." *Id.* at 42a, 43a. This vague discussion, to say the least, does not "lend[] predictability to the legal system by permitting potential defendants to structure their

conduct with at least some assurances as to where that conduct may render them liable to suit." *Rees v. Mosaic Techs., Inc.*, 742 F.2d 765, 768 (3d Cir. 1984).

### B. The Proximate Causation Standard is Based in History And Experience.

In place of the California Supreme Court's malleable and unpredictable approach, this Court should adopt the proximate-cause standard, under which "the defendant's in-state conduct must form an important, or [at least] material, element of proof in the plaintiff's case." *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) (citation omitted). The Court has already strongly suggested that proximate cause is the appropriate standard. *See Burger King*, 471 U.S. at 473–74 ("[W]here individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise *proximately* from such activities.") (citation omitted) (emphasis added).

The proximate-cause standard furthers all the core purposes of personal jurisdiction: fairness, predictability, and federalism. "The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 223 (2012) (Scalia, J., concurring) (citation omitted). Put another way, "[e]very event has many causes . . . and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result." *Paroline v.*

determination versus the mitigating factor, which is a discretionary "judgment call" and "mostly a question of mercy," *see* 136 S. Ct. at 642, seems to agree with the Fifth Circuit in that an affirmative finding of aggravation is different than a finding of mitigation, which reduces the sentence from the statutory maximum. *See Granados*, 455 F.3d at 537.

Ultimately the *Carr* Court concluded that the existing case law did not require jury instruction that mitigating circumstances need not be proven beyond a reasonable doubt. *Id.* In support, the Court relied on *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998), in which the Court upheld a death sentence even though the trial court "failed to provide the jury with express guidance on the concept of mitigation," as well as *Weeks v. Angelone*, 528 U.S. 225, 232-33 (2000), in which the Court reaffirmed that it has "never held that the State must structure in a particular way the manner in which juries consider mitigating evidence" and rejected argument that it was unconstitutional to instruct jurors to "'consider a mitigating circumstance if you find there is evidence to support it," without additional guidance. The same logic extends to preclude any burden-of-proof instruction for the mitigation special issue.

The Court's doubt about whether it is even possible to apply a burden of proof to the mitigating-factor determination at the least confirms that the

work that morning a *proximate* cause of the accident. "Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith." *Holmes*, 503 U.S. at 287 (Scalia, J., concurring).

The proximate-cause standard avoids a but-for standard's lack of predictability by filtering out situations where the defendant's conduct can be called a "but for" cause in a loose sense, but did not meaningfully cause the plaintiff's injury. "A requirement of proximate cause thus serves . . . to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline*, 134 S. Ct. at 1719; *cf. Caterpillar, Inc. v. Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am.*, 107 F.3d 1052, 1068–69 (3d Cir. 1997) (en banc) (Alito, J., dissenting) (giving examples of weak but-for causes).

The proximate-cause standard also respects the relationship between the benefits that a defendant receives from accessing a forum state and the obligations the defendant incurs as a result. "But-for causation," on the other hand, "cannot be the sole measure of relatedness because it is vastly overinclusive in its calculation of a defendant's reciprocal obligations." *O'Connor*, 496 F.3d at 322. "If but-for causation sufficed, then defendants' jurisdictional obligations would bear no meaningful relationship to the scope of the benefits and

protection received from the forum." *Id.* (internal quotation marks omitted).

Finally, "proximate cause" is a workable standard because it has a "familiar" meaning with a firm historical pedigree. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). "It is a well-established principle of [the common] law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause." *Waters v. Merchants' Louisville Ins. Co.*, 36 U.S. 213, 223 (1837). Proximate cause is based on "the familiar maxim, 'Causa proxima, non remota, spectator,'" which means that in law the immediate, not the remote cause of any event is to be regarded. *The G.R. Booth*, 171 U.S. 450, 453 (1898).

This Court regularly draws on the established and familiar body of proximate-causation principles. Observing that "courts have a great deal of experience in applying" proximate causation and that "there is a wealth of precedent for them to draw upon in doing so," the Court has "construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). *See, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (securities fraud); *Holmes*, 503 U.S. at 268 (RICO); *cf. Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996) ("courts sitting in admiralty may draw guidance from . . . the extensive body of state law applying proximate causation requirements").

The Court should do so here as well. It would accomplish little to reject California's non-causal

approach only to adopt in its place—or see the lower courts adopt—a but-for standard that is no more predictable, and only marginally less malleable, in its application.

## CONCLUSION

The Court should reverse the California Supreme Court's decision.

Respectfully submitted,

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(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling

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FILED
MAR 30 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-466

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*PETITIONER,*

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, ET AL.,
*RESPONDENTS.*

On Writ of Certiorari to the
Supreme Court of California

## BRIEF OF AMICUS CURIAE ALAN B. MORRISON, IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS CURIAE[1]

Alan B. Morrison is an associate dean at George Washington University Law School, where he teaches personal jurisdiction, as part of his civil procedure course, and the basic constitutional law course. He is filing this brief because he is frustrated by the incoherence of this Court's doctrines relating to personal jurisdiction and with his inability to provide his students with a rationale for the Court's decisions. He has concluded that the Due Process Clause of the Fourteenth Amendment has proven a wholly unsatisfactory answer to the question of whether a state may constitutionally require an out-of-state business to defend a lawsuit brought in that state. Instead, this brief argues that this Court's opinions under the Dormant Commerce Clause, with its focus on possible undue burdens on out-of-state businesses from being forced to defend an action in a particular state court, is a much surer source of a proper balance in this area.

## SUMMARY OF ARGUMENT

The Due Process Clause should no longer be used to decide whether a state may bring an out-of-state defendant into its courts. There is no textual basis using that Clause for this purpose, and the

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[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than amicus has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

first case to rely on it, *Pennoyer v. Neff*, 95 U.S. 714 (1877), provided no analysis for its conclusion that the then-recently enacted Fourteenth Amendment had any logical or other connection with the personal jurisdiction question presented.

A further problem with this Court's Due Process approach to personal jurisdiction is the sharp doctrinal divide that this Court has created between general and specific jurisdiction, with no textual basis for it. Moreover, as this case shows, the world of commerce is not so neatly divided, and creating two air-tight categories results in decisions that are inconsistent with the rationale for this Court's decisions following *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The terms "general" and "specific" do not appear in that decision, which properly focuses on the basic question of whether requiring International Shoe to defend itself in the State of Washington would be "an unreasonable or undue procedure." *Id.* at 320.

It is in the application of that distinction, especially in the Court's most recent personal jurisdiction decisions in which it has drawn sharp, and we believe, artificial lines between general and specific jurisdiction, that have produced results that cannot be reconciled with the many cases upholding jurisdiction after *International Shoe*. Perhaps the clearest evidence that the recent decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), are out of step with the understanding of business defendants, as well as plaintiffs and the lower courts, is that the

US corporate parent in *Goodyear*, as well as the wholly-owned subsidiary in *Daimler*, never contested personal jurisdiction over them. *Goodyear*, 564 U.S. at 918; *Daimler*, 134 S. Ct. at 758. However, under this Court's "at home" test enunciated in those cases, there was probably no general jurisdiction over either non-objecting defendant, and there was no possible claim for specific jurisdiction. However, there is nothing in *International Shoe* or elsewhere in the Constitution that would prevent a state court from adjudicating the claims in those cases against the parent in *Goodyear* in North Carolina or the subsidiary in *Daimler* in California, yet that is the seeming result of the recent creation of artificial and unworkable dividing lines between the Court's extra-constitutional categories of general and specific jurisdiction.

Abandoning Due Process would not leave businesses open to being dragged across the country to defend claims in locations where neither they nor the claims against them have any connection. A state that sought to do that would be met with the well-established defense that the Dormant Commerce Clause does not permit a state to impose undue burdens on out-of-state businesses engaged in interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Separating Due Process from Dormant Commerce Clause claims is precisely the approach that this Court took in *Quill Corp. v. North Dakota*, 504 U.S. 298, 309-16 (1992). This Court abandoned the Due Process objection that it had sustained as an alternate ground in the prior, nearly identical case

of *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), but affirmed the prior result on the ground that North Dakota's law violated the Dormant Commerce Clause. As this brief demonstrates, the Dormant Commerce Clause is a correct and more tailored approach to these issues and will provide a clearer, easier to apply, and more coherent basis for deciding whether a state has gone too far in requiring an out-of-state business to defend a claim in its courts.

## ARGUMENT

### A. THE COURT SHOULD NO LONGER USE THE DUE PROCESS CLAUSE TO DETERMINE THE CONSTITUTIONALITY OF STATE COURT ASSERTIONS OF PERSONAL JURISDICTION.

#### 1. *The Lack of Textual Basis.*

The Due Process Clause of the Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty or property, without due process of law." For almost 140 years, beginning with *Pennoyer v. Neff*, 95 U.S. 714 (1877), this Court has relied on that Clause to adjudicate the efforts of states to expand the reach of their courts. But the assertion that it is the Due Process Clause that forbids states from reaching beyond their borders was an almost offhand conclusion, not justified by the text of the Clause, the opinion, or any of the Court's prior precedents.

This is what the Court said in finding that the Due Process Clause is the basis of the limitation:

> Since the adoption of the Fourteenth Amendment to the Federal Constitution [in 1868], the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.

95 U.S. at 733. According to the Court, the words Due Process "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Id.* But the Court did not further elaborate – based on text or even history – why the substantive power of a state court to exercise judicial authority over a defendant is found in these "rule and principles."

There is no dispute that the Due Process guarantee assures that protections that are plainly procedural in nature, such as notice and a meaningful opportunity to be heard, fall under it. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). They are procedural because they come within the term "process," and the question in specific cases is whether a party received all the "process," *i.e.* procedural protections, that are due under the circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The question of whether a state court may enter a valid judgment against an out-of-state defendant is of a different variety. No matter whether a defendant has received actual notice of the proceeding and is given every imaginable means of being heard before a lawfully appointed judge, with the right to counsel and to call witnesses and subpoena evidence, the defendant may still object that the state court is attempting to exercise power over that defendant that it does not have. In that situation, the objection is not procedural, but is substantive, because no amount of process can cure it. *See Kerry v. Din*, 135 S. Ct. 2128 (2015) (all Justices agreeing that Due Process must be provided only when there is some recognized substantive right to be protected). When personal jurisdiction is the issue, the proper source of that right is not the Fourteenth Amendment itself, but, as amicus argues below, the Dormant Commerce Clause.[2]

This is not to suggest that *Pennoyer* reached the wrong result. The default judgment against Neff was almost certainly void because the plaintiff

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[2] Over vigorous dissents, the Court has also relied on the Due Process Clause to attempt to control punitive damages, with line drawing difficulties not dissimilar to those for personal jurisdiction. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429-439 (2003) (Scalia, Thomas, & Ginsburg, JJ, dissenting). The one aspect of *State Farm* which did permit sensible law drawing – excluding harms that occurred outside the state from the calculation, *id.* at 421-22 – could readily be achieved through a Dormant Commerce Clause analysis of the kind proposed in Section B.

Mitchell made no effort to assure that Neff had notice of the lawsuit or of the sale of Neff's property following the default judgment against him. 95 U.S. at 719-20. As a result, the attempt at notice was no more than "a mere gesture," because the "means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

The seminal personal jurisdiction case post-*Pennoyer* is *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), where the Court expanded the situations in which a state could exercise personal jurisdiction over an out-of-state party, but provided no further justification that Due Process was the source of that protection. The company had argued "that its activities within the state were not sufficient to manifest its 'presence' there and that in its absence the state courts were without jurisdiction, [and] that consequently it was a denial of Due Process for the state to subject appellant to suit." *Id.* at 315. This Court simply accepted the Due Process premise, but found it was satisfied because defendant had "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice." *Id.* at 316. Again, as in *Pennoyer*, there is no discussion of why the Due Process Clause creates these limits on state power. And, no subsequent case has questioned the applicability of the Due Process Clause to state court personal jurisdiction, nor elaborated on the basis for it.

### *2. The Current Test is Dysfunctional.*

In addition to its questionable pedigree, the Due Process minimum contacts test has been reformulated into the dubious question of whether the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State. . . ." *J. McIntyre Machinery, Ltd., v. Nicastro*, 564 U.S. 873, 877 (2011) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). In *McIntyre*, a British manufacturer sold a three-ton, shearing machine with a "massive cutting capacity," costing $24,900, to a scrap metal dealer in New Jersey, whose employee was injured by the machine and sued McIntyre in state court there. 564 U.S. at 894 (Ginsburg, J., dissenting). McIntyre UK had sold its products in the United States through an exclusive distributor in Ohio. *Id.* at 878-79 (plurality opinion). The machine in question was one of no more than four that were ever sold in New Jersey, and there was no evidence that McIntyre "targeted" the state for business. *Id.* at 877-79. On those facts, the Court set aside the ruling that the state court had personal jurisdiction over the manufacturer because of a lack of purposeful availment with New Jersey regarding this machine. There are three major problems with the purposeful availment formula and the holding in *McIntyre*.

First, the result is very difficult to reconcile with one aspect of another international products liability case, *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The holding in *World-Wide Volkswagen* – that the dealer in New York who sold the allegedly defective car and the

regional distributor for the New York area cannot be sued in Oklahoma for injuries occurring there – is not problematic. But, like the dog that did not bark for Sherlock Holmes,[3] there were two other defendants in *World-Wide Volkswagen*, the German manufacturer and the importer, who did not contest jurisdiction in Oklahoma, even though there was no claim that there was any direct connection between them, the plaintiffs' injuries, and that state. Those defendants had every incentive to avoid suit in an inconvenient and perhaps plaintiff-friendly state court, but they never claimed that the state court did not have personal jurisdiction over them. That was almost certainly because they concluded that a company that sells its products without geographic restrictions throughout the United States can be sued in any state where their product causes injuries based on a claim that it was defectively designed or manufactured.

The problem is in reconciling that sensible result with a finding of a lack of personal jurisdiction in *McIntyre*. Indeed, applying the rationale of *International Shoe*, most students find the assertion of personal jurisdiction over the manufacturer of an immobile shearing machine for causing an injury in New Jersey at least as appropriate and fair as a plaintiff seeking damages in Oklahoma from a defective automobile that was driven a thousand miles from where it was

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[3] Arthur Conan Doyle, *The Adventure of Silver Blaze*, *in The Complete Adventures and Memoirs of Sherlock Holmes* 184 (Bramhall House ed. 1975) (1892).

purchased and across the ocean from where it was manufactured.

Students are even more perplexed when the Due Process comparison is made with the outcome in *Burnham v. Superior Court*, 495 U.S. 605 (1990). Mr. Burnham, who was recently separated from his wife in New Jersey, went to California for three days, mainly to visit their children. While he was there, he was personally served with process in his wife's suit for divorce, spousal support, and custody of their children. Students accept the Court's unanimous conclusion (albeit with no opinion supported by five Justices) that the California courts had jurisdiction in the case, mainly because of the common law tradition validating in state service, coupled with the fact that every state would reach the same result as a matter of state law. What students cannot accept is that the Court dismissed the suit against McIntyre for lack of personal jurisdiction over the claim based on the sale of its dangerous machine, while allowing the divorce claim against Mr. Burnham to be heard.

Second, the stated purpose of these Due Process protections is to assure 'traditional notions of fair play and substantial justice" are not offended by state court assertions of personal jurisdiction. *International Shoe*, 326 U.S. at 316. Perhaps because of the highly subjective nature of those goals, coupled with similar problems with the "purposeful availment" test, it is very difficult to explain to students why assertions of jurisdiction in cases like *McIntyre* are unfair to the defendant. Although the Court never said where in the United States the defendant in *McIntyre* could be sued

over a defective machine, it would at least be in Ohio where its distributor for the entire country was located and to which the manufacturer presumably sent the machines purchased in this country. 564 U.S. at 878. If this British company could be sued in Ohio, or in other states where it sold more than one machine, or in Nevada where it successfully solicited business from the owner of the plant where Nicastro worked, it is almost impossible to explain why it was "unfair" and contrary to principles of "substantial justice" for it to be sued in New Jersey for damages caused there, even if the machine arrived there via its Ohio distributor. *Id.* at 895. And if it could not be sued anywhere in the United States, students cannot understand how that comports with *International Shoe* and the expansion of personal jurisdiction to fit the modern commercial world.

Third, the purposeful availment approach has transformed what should be a simple threshold inquiry into a major additional round of litigation, almost wholly unrelated to the merits. Consider the facts in *McIntyre* and what a plaintiff must do now in a case in which the defendant moves to dismiss for lack of personal jurisdiction. Plaintiff's lawyer would have no choice but to embark on extensive discovery from the defendant (which was hoping to get out of the case, at least in part to avoid any discovery) to learn about all its connection with the forum state, as well as from the distributor and plaintiff's employer. Given the Court's focus on the lack of facts to support jurisdiction in *McIntyre,* especially in the concurring opinion of Justices Breyer and Alito,

plaintiff's counsel would be wise to leave no stone unturned and would seek to gather at least the following information: all sales in the United States and especially in New Jersey; all McIntyre UK personnel in the United States; all U.S. advertising and promotional activities; the company's service and warranty program for the machine at issue; and by whom and by what route the machine at issue was delivered to the place where the injury occurred. By contrast, as explained in Section B, relying on the Dormant Commerce Clause to decide personal jurisdiction would raise very few factual issues and create very little need for discovery because the question would be a much simpler and essentially generic inquiry: does the exercise of jurisdiction over the manufacturer of a dangerous machine brought into the state impose on an undue burden on interstate or, in *McIntyre,* foreign commerce?

### *3. The Divide Between General & Specific Jurisdiction Is Without Textual Basis and Is Unworkable.*

Finally in an effort to clarify and perhaps simplify the area, the Court has recently divided the world of personal jurisdiction into two rigid categories – general and specific – but that has created far more problems than it has solved. General jurisdiction allows the defendant to be sued on any claim, no matter where the allegedly wrongful conduct occurred, whereas specific jurisdiction applies only if the claim arose in or was related to the jurisdiction in which the case was brought. As set forth in *Goodyear* and *Daimler*, a corporation is subject to general jurisdiction where

it is "at home," which includes its place of incorporation and principal place of business – and possibly nothing more. *Goodyear*, 564 U.S. at 919; *Daimler*, 134 S. Ct. at 760-61. While this at least assures that there is some state(s) where every US corporation can be sued, that will not be true for most non-US corporations.

Under this approach to personal jurisdiction, defendants may not be sued anywhere besides their home, unless there is a specific connection between the claim and the jurisdiction in which the suit was filed. Many cases, such as the auto accident in *Hess v. Pawloski*, 274 U.S. 352 (1927), are easy to decide, but others, such as *World-Wide Volkswagen, McIntyre*, and this case, have no clear answers. The current uncertainty, which has been going on for more than 30 years, is not a temporary problem, but one that is almost certain to continue, given the complexity of our economy and the multiple ways in which businesses are organized. And this does not take into account the impact of the Internet, which will vastly magnify the difficulties of connecting the plaintiff's claim and the forum. *See McIntyre*, 564 U.S. at 890-92 (Breyer, J., concurring); Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs"*, 100 Cornell L. Rev. 1129, 1157-61 (2015).

This division by the Court is also inconsistent with the apparently settled expectations of large corporate defendants and their sophisticated counsel. In three personal jurisdiction cases before this Court – *World-Wide Volkswagen, Goodyear*, and *Daimler* – defendants

did not contest aspects of personal jurisdiction on which they would now have a substantial chance of winning under the new approach. In *World-Wide Volkswagen*, the German manufacturer was plainly not "at home" in Oklahoma, and it is likely that the flaws in design and manufacturing defects that caused the injuries to plaintiffs did not "arise" in Oklahoma. For those reasons, the automobile maker would argue today that there is an insufficient relation to that state for suit to be brought there, even though the accident, in which the plaintiff's car burned its passengers, occurred in Oklahoma. At the very least, defendant manufacturers in similar cases will now have a major litigable issue unrelated to the merits, on which considerable discovery is likely to be required.

Similarly, in *Goodyear*, suit was brought in North Carolina state court against the parent company, an Ohio corporation, as well as three foreign subsidiaries. 564 U.S. at 918. The claim was based an accident in France in which allegedly defective tires, made by the subsidiaries outside the United States, exploded, causing the deaths of the plaintiffs' children, who were North Carolina residents. Amicus agrees with that North Carolina erred in asserting personal jurisdiction over the foreign subsidiaries, under whatever test is proper.

What is more significant is that the parent company made no objection to personal jurisdiction over it, even though it was not at home in North Carolina and it had done nothing in that state that was in any way connected to the claims of the plaintiffs. Not surprisingly, the record in *Goodyear*

does not reflect why the parent company did not ask this Court to find that the North Carolina courts lacked personal jurisdiction over it. The most likely reason is that Goodyear simply assumed that, because it was a major supplier of tires in North Carolina, it could be sued on any claim that anyone had against it relating to its tires, no matter where the claim arose, just like the manufacturer defendant in *World-Wide Volkswagen* assumed that it could be sued in Oklahoma over a defective car that caused injuries in that state. However, under this Court's current general and specific jurisdiction tests, Goodyear USA, the parent corporation, would surely contest personal jurisdiction today, not just in any case where the tires at issue were made by a subsidiary, but even if the defectively designed or manufactured tires that injured the plaintiffs were its own, unless they were actually made or sold in the state where the accident took place.

*Daimler* is the third case illustrating how the new rigid rules on personal jurisdiction have unsettled prior assumptions of litigants, scholars, and lower courts. At issue there were claims that an Argentine subsidiary of a German corporation, allegedly acting in collaboration with Argentine officials, intentionally inflicted serious physical injuries on plaintiffs, all of whom were citizens of Argentina. 134 S.Ct at 751-52. The plaintiffs sued only the parent and argued that California could assert general jurisdiction over it by treating its wholly-owned U.S. subsidiary as its agent in California. *Id.* at 752. The parent contested personal jurisdiction throughout the case, but

conceded that the U.S. subsidiary, which was incorporated and had its headquarters in New Jersey, was subject to general jurisdiction in California, presumably because it did substantial business in the state. This Court found that there was no jurisdiction over the parent, a holding that is correct and does not create any problems.

The difficulty arises from the Court's division of all personal jurisdiction into two quite constricted departments and its impact on future cases. For example, *Daimler*, read as petitioner does, would rule out general jurisdiction except in the defendant's home states, no matter how much business related to the product causing the injury the defendant did in the forum state. That alone would be harmful enough, but given *McIntyre* and the positions taken by petitioner and its amici in this case, there might also not be specific jurisdiction if, for example, the plaintiff purchased the product from defendant in state A and later moved to State B, where plaintiff's injuries become manifest.

There is one other quite common situation that may make obtaining specific jurisdiction even more difficult if the Court were to agree with petitioner here. Many foreign manufacturers, for legitimate reasons having nothing to do with personal jurisdiction, establish wholly-owned U.S. subsidiaries through which all of their sales are made in this country for products manufactured abroad. Under the Court's current approach, with the parent not at home anyplace in the United States, and with the claim based on defective designs or manufacturing done abroad by the

parent, the parent may not be able to be sued *anywhere* in this country on purely state law claims, even for injuries sustained here. Moreover, even if the plaintiff has a valid claim against the U.S. non-manufacturing subsidiary, over which it *can* obtain personal jurisdiction someplace in the United States, discovery will be needed against the non-U.S. parent, which will be at least very complicated, if it can be done at all.

There is yet another complication that makes personal jurisdiction even more problematic in many of these cases. As the records in *Daimler* and *World-Wide Volkswagen* show, even the U.S. subsidiary (importer) does not sell automobiles to consumers: they are sold through truly independent dealers. Hence, after *McIntyre* and the arguments petitioner is making in this case, the manufacturer's subsidiary may also be able to avoid being sued where the plaintiff was injured. Moreover, although the defendants in *McIntyre, Goodyear,* and *Daimler* were foreign corporations, the principles that the Court has enunciated appear to apply equally to companies incorporated in the United States. *See McIntyre*, 564 U.S. at 885. If the Court follows through on this approach to general and specific jurisdiction, it will have created a roadmap by which major U.S. manufacturers of potentially dangerous products can effectively insulate themselves from suits in state courts except in their home states.

If the Due Process Clause, or some other part of the Constitution, contained the words general and specific, modifying personal jurisdiction, or if the Court had used that method

of adjudicating constitutional defenses to assertions of personal jurisdiction from the outset, the Court might be justified in retaining them. But neither is true, and in fact, the terms first appeared in an opinion of this Court in footnotes 8 & 9 in *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 (1984), which cited to law review articles that used them. Moreover, the stringent limits on general jurisdiction embodied in the "at home" test for general jurisdiction date only from 2011 in *Goodyear*. The current dichotomy between specific and general jurisdiction used in determining whether personal jurisdiction over a business defendant is permitted, and the implications for the specific jurisdiction cases that will flow from those rulings, further demonstrate why the Due Process Clause is not a proper basis on which to decide constitutional questions relating to personal jurisdiction.

### B. THE COURT SHOULD DETERMINE THE CONSTITUTIONALITY OF STATE COURT ASSERTIONS OF PERSONAL JURISDICTION UNDER THE DORMANT COMMERCE CLAUSE.

Abandoning the Due Process Clause in personal jurisdiction cases will not result in the end of limits on state court assertions of personal jurisdiction. In its place, amicus urges the Court to utilize the tests developed under the Dormant Commerce Clause that prevent states from imposing unreasonable burdens on interstate and foreign commerce. Although subjecting a business to suit in the courts of a state in which it is not regularly doing business is not generally described

as the state attempting to regulate the conduct of that business, that is the impact of a judgment against an out-of-state defendant in a lawsuit: the state is effectively ordering the defendant to conduct its business in a certain manner or, as in this case, to pay for failing to have done so. *See* United States Brief 22, recognizing regulatory impact of state court adjudications. Thus, because California may constitutionally regulate petitioner's sale of Plavix in California, there should be no Commerce Clause barrier to a California court entering a judgment against petitioner that has that regulatory effect regardless of where the Plavix was sold or used.

The idea that the Dormant Commerce Clause is relevant to the issue before the Court is hardly a new concept. Indeed, prior to *International Shoe,* defendants that objected to state courts entertaining suits against them relied principally on claims of undue burden under the Dormant Commerce Clause. *See Denver & R. G. W. R. Co. v. Terte*, 284 U.S. 284 (1932) and the cases cited therein. Although the Due Process Clause was mentioned in that case, this Court found undue burden under the Formant commerce Clause for one railroad, but not the other, in resolving the issue of personal jurisdiction there.

Similarly, in *International Shoe* itself, the Dormant Commerce Clause was part of the basis of the company's objection:

> Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not

> detain us. For 53 Stat. 1391, 26 U.S.C. § 1606(a) . . . provides that 'No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.' It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it.

326 U.S. at 315. The "statute" in the quoted passage refers to the law imposing substantive liability for unemployment taxes on International Shoe, which was also a question resolved against the company as was its personal jurisdiction defense. *Id.* at 320-21. Having found that the state had the power to assess unemployment taxes against International Shoe, it is almost inconceivable that the Constitution would not permit the state to collect that tax in its own courts, rather than having to sue the taxpayer in the company's home state courts. Put another way, if there was no Dormant Commerce Clause objection to a state statute imposing an unemployment tax on International Shoe, and seeking to collect it in that state's courts, it is amicus's position that there can be no constitutional objection to suing an out-of-state defendant in other cases in which the state

may regulate the conduct of the defendant consistent with the Dormant Commerce Clause.

The proper relation between the Due Process Clause and the Dormant Commerce Clause can be seen in two cases in which states sought to impose an obligation on out-of-state mail-order businesses to collect the use tax that is payable by the in-state purchaser for goods sent from out-of-state. In both cases, *National Bellas Hess Corp. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), it was agreed that neither the state in which the purchases were made, nor the state into which the product was sent, could constitutionally collect a *sales* tax on the product. It was also agreed that the state into which the product was sent may collect a *use* tax from the purchaser in an amount equal to the sales tax that the state would have collected if the sale had been made by an in-state merchant. The question presented in both cases was whether the state seeking to collect the use tax could require the out-of-state seller to collect that tax for it under both of those Clauses.

In *National Bellas Hess*, the Court discussed the relationship between the two Clauses as follows:

> National argues that the liabilities which Illinois has thus imposed violate the Due Process Clause of the Fourteenth Amendment and create an unconstitutional burden upon interstate commerce. These two claims are closely related. For the test whether a particular state exaction is such

> as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar.

386 U.S. at 756. The Court then agreed that the state could not constitutionally impose such a requirement, without differentiating between the two grounds. *Id* at 758. Although the Court does not use either "procedural" or "substantive" to characterize the Due Process defense, the context makes it quite clear that the constitutional flaw was not procedural because the company made no complaints about a lack of notice or opportunity to contest the tax. *Id.* at 756. It simply argued that the state had no power to coerce it into collecting the tax, the precise kind of claim made in the Due Process personal jurisdiction cases in Section A. The three dissenting Justices disagreed with the majority on whether the state tax collection law had imposed a substantial burden on interstate commerce, without separately addressing the Due Process claim, although the language that it used to determine the lawfulness of the burden on commerce is reminiscent of language from personal jurisdiction decisions.[4] Yet nothing in the majority

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[4] "As the [majority] says, the test whether an out-of-state business must comply with a state levy is variously formulated: 'whether the state has given anything for which it can ask return'; whether the out-of-state business enjoys the protection or benefits of the State; whether there is a sufficient nexus: 'Some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'." 386 U.S. at 765 (Fortas, J., dissenting) (footnotes omitted).

opinion suggests that a purchaser who was unhappy with the quality of National's products, or was injured by them, could not sue the company in the courts of Illinois to recover the sales price or the damages for any resulting harm.

The same two objections to collecting a use tax were made 25 years later in *Quill*, with the same result, although only on Dormant Commerce Clause grounds. 504 U.S. at 318. In describing its prior decision on this issue, the majority observed that it ruled against the state in the earlier case because the out-of-state seller "lacked the requisite minimum contacts with the State," 504 U.S. at 301, the very terms used in *International Shoe*, 326 U.S. at 316, but not satisfied in *National Bellas Hess*. The majority then disagreed with the conclusion in *National Bellas Hess* that the two Clauses completely overlapped, in part because it noted that Congress can cure a Dormant Commerce Clause violation, but cannot fix the problem if there is a Due Process objection – at least when the issue is the power of the state to require an out-of-state business to comply with its laws. 504 U.S. at 305. It then went on to overrule the Due Process basis for striking down the law at issue in *National Bellas Hess*, relying in part on *International Shoe*, and *Burger King v. Rudzewicz*, 471 U.S. 462 (1985). *Id.* at 308. It nonetheless declined to overrule *National Bellas Hess* on Dormant Commerce Clause grounds, in part for reasons of stare decisis and in part because Congress was now able to deal with the situation once the Due Process basis was removed. *Id.* at 318; *see also id.* at 320 (Scalia, J., concurring). Thus, *Quill* establishes that a state

law can be consistent with Due Process, but violate the Dormant Commerce Clause because the inquiries are related, but separate.

The validity of a state law like that in *Quill* requiring the collection of taxes owed by others is, to be sure, different from the question of whether a state may require an out-of-state defendant to respond to a claim filed in its courts. Nonetheless, there are two sets of reasons why the answers to both questions can and should be determined by application of Dormant Commerce Clause jurisprudence and not under the substantive aspect of the Due Process Clause on which this Court has traditionally relied. First, as demonstrated in Section A, *supra*, the Due Process personal jurisdiction doctrine is without basis in the Constitution, and it has produced (a) decisions that are difficult to apply, (b) results that are difficult to justify in light of the stated purposes of the limits on personal jurisdiction, and (c) the need for extensive discovery on the threshold issue of whether there is specific jurisdiction, which will be required in all but the most routine cases. Second, as we now demonstrate, the Dormant Commerce Clause is a proper constitutional fit, it is relatively easy to apply, it produces sensible results in personal jurisdiction cases, and it generally will require little or no discovery to resolve.

Although this Court's decisions in cases such as *Goodyear, Daimler, World-Wide Volkswagen,* and *McIntyre* focus on the extent of the defendant's contacts with the forum state, each of the opinions makes clear that the Court's underlying concerns are with the potential adverse impact of upholding

personal jurisdiction on the ability of the defendant to engage in foreign or interstate commerce. *See also* United States Brief 2. That concern is at the heart of this Court's Dormant Commerce Clause jurisdiction, which, unlike the Due Process approach to personal jurisdiction, is derived from the words of the Commerce Clause itself. Within the strands of Dormant Commerce Clause jurisprudence, the proper Dormant Commerce Clause test to determine whether a forum state can exercise jurisdiction over a particular defendant is that in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Accordingly, to demonstrate that this approach is doctrinally sound, produces fair results, and can be applied with a minimal amount of discovery, amicus will apply it to this Court's most recent

significant personal jurisdiction cases, whether falling under general or specific jurisdiction. [5]

In *World-Wide Volkswagen*, there were four defendants, but for simplicity, focusing on the manufacturer and the dealer will illustrate how the Dormant Commerce Clause can properly resolve the personal jurisdiction question for both of them. Under the Dormant Commerce Clause, a court would ask whether Oklahoma could constitutionally regulate the conduct that was the basis of the claim in that case, for example, by passing a law prohibiting automobiles from operating in the state with certain design or manufacturing defects, regardless of where the car was manufactured or purchased. Under that law, the state could seek monetary penalties or a court order directing the recall or repair of non-conforming vehicles. Based on *Pike*, that law would not create an excessive burden on foreign commerce, as long as the covered defects were similar to those imposed on the manufacturer in other jurisdictions in which its products were sold. In that situation, a suit to collect those penalties, or obtain an injunction, could be brought against

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[5] States may also violate the Dormant Commerce Clause by discriminating against out-of-state businesses under laws that literally or practically only disadvantage out-of-state businesses. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Although long-arm statutes apply only to out-of-state defendants, they do not fit within the Court's anti-discrimination rationale because their goal is to put in-state and out-of-state defendants on the same footing, not to disadvantage out-of-staters.

the manufacturer in the Oklahoma courts without violating the Dormant Commerce Clause.[6]

However, if Oklahoma sought to apply that law to a New York auto dealer who sold the car to the person driving it there, that would create very significant burdens on the dealer. Thus, in order to comply with that law, the dealer would have to, in effect, re-make and re-design every vehicle that it sold, no matter where it went in the United States. Under a Dormant Commerce Clause analysis, that burden would be clearly excessive, and the law could not be enforced against an out-of-state dealer. Returning to the personal jurisdiction issue, and using the Dormant Commerce Clause analysis in this brief, the state court would not have personal jurisdiction over tort or other claims against the dealer, but it would against the car's manufacturer. And, unlike under the *McIntyre* approach, there would appear to be little or no need for discovery to decide the motions to dismiss for want of personal jurisdiction by either the dealer or the manufacturer. Moreover, this approach would lead to results that are readily predictable, a goal that petitioner and its amici espouse.

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[6] The United States (Br. 24-25, n. 3) correctly observes that Plavix as well as many other consumer products are subject to federal rules that preempt different state laws. That observation is not a reason to deny California's assertion of personal jurisdiction here, but one to permit it, because the federal standards would eliminate the danger that California would apply a different substantive standard than would apply elsewhere.

In *Burger King v. Rudzewicz*, 471 U.S. 462 (1985), the out-of-state defendant was required to litigate a claim involving a contract that it signed with a Florida franchisor. To test the Dormant Commerce Clause approach, suppose that Florida passed a law imposing modest monetary penalties on all parties to a franchise agreement for failure to comply with its material terms without good cause. Under *Pike*, that law would not create any special burdens on interstate commerce that it did not impose on local businesses, and so would not be subject to a Dormant Commerce Clause objection. In such a case, the out-of-state party would have to defend the claim in the Florida courts, just as did the defendant in the actual *Burger King* case.

*Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), is another personal jurisdiction case that could have been readily resolved in a sensible and fair manner under *Pike*, with much less difficulty than in the actual case, for which there was no majority opinion. The objecting party there was the maker of valves used in tubes for motorcycle tires. It was located in Taiwan and had sold its valves to a Japanese tube making company which in turn had sold them to the tire maker, which in turn had sold the tires that were the alleged cause of the plaintiff's injuries while riding his motorcycle. *Id.* at 106. The Due Process question in *Asahi* was whether the tube maker could continue with its cross-claims against the valve maker in the California state courts after all other claims and cross-claims had settled. Under *Pike*, the question would be, whether, under a hypothetical California law, the state could

dictate the standards which the Taiwan valve maker had to follow in California or be subject to monetary penalties or an injunction for failing to do so. The answer would surely be that the burden on that foreign company of following California law would be clearly excessive, although perhaps a different answer might be given if the valve maker was a US company whose products were sold to tube and tire makers throughout this country. Under the *Pike* approach, if that substantive burden could not be imposed under the Dormant Commerce Clause (domestic or foreign), then the valve maker could not be sued on that unenforceable obligation, even if the claim arose in a tort instead of a penalty enforcement case.

On the other hand, if *McIntyre* were viewed with a *Pike* lens, the result would almost certainly have been different. Thus, if New Jersey established substantive safety standards for shearing machines that were not preempted by federal law, McIntyre could not have objected to complying with them for its machines that ended up in New Jersey. That would be true whether it sold the machine directly or through a subsidiary or an independent distributor because either way any burdens would not be excessive in light of New Jersey's interests in protecting its citizens against all dangerous machines, no matter where they were manufactured. And if McIntyre had no Dormant Commerce Clause objection to the substantive standard, it could be sued in New Jersey state courts if its failure to comply with New Jersey's rules injured the plaintiff.

*Goodyear* and *Daimler* would have reached the same result under *Pike*, albeit by a different and much more direct route. Surely, North Carolina could not dictate the safety standards for foreign manufacturers applicable to tires not sold in North Carolina. *Goodyear*, 564 U.S. at 921. Nor could California dictate to the employees of an Argentine subsidiary of Daimler, what they may and may not do in Argentina, no matter how offensive California may find their conduct to have been. In neither case would any discovery be needed, and a motion to dismiss might not even need to be made because the excessiveness of the burdens that a California substantive standard would impose on Daimler would be obvious to all.

Of course, invoking the Dormant Commerce Clause will not automatically answer all personal jurisdiction cases involving a commercial defendant because there are still disputes about how to apply the Dormant Commerce Clause even if it is clear that it supplies the applicable governing rule of law. But compared to the difficulties that this Court, many other courts, law professors, and law students have with the current Due Process jurisprudence, using the Dormant Commerce Clause would be a vast improvement.

The superiority of a Dormant Commerce Clause approach to that of a Due Process focus on contacts and purposeful availment can be seen from the facts of a recent state sales tax case, which could easily be present in a personal jurisdiction context. In *American Business USA Corp. v. Florida Department of Revenue*, 191 So. 3d 906 (2016), *cert denied*, 2017 WL 670227 (2017), an

online flower business fulfilled its orders through independent flower shops in various states for delivery to the person designated by the purchaser. The issue in the actual case was whether the Dormant Commerce Clause precluded Florida from imposing a sales tax on flowers delivered out of state, and the Florida court upheld the tax. Suppose that instead of a tax dispute, the disputes were over (1) the quality of the flowers, (2) whether the flowers contained insects that infected the house of the recipient, and/or (3) the non-payment by the purchaser of the amount due. The purchaser and the recipient may not know whose flowers were delivered and/or the location of the online company (or its website operators) or the flower shop. Similarly, the online company may only know the name of the purchaser, but have no idea where that person lives or where the person was when the order was placed.

In that situation, asking whether any of the potential defendants "purposefully availed" themselves of any of the fora where they might be sued is a quest bound to fail because that question is meaningless and ill-suited for deciding whether the defendant can be sued in a particular jurisdiction. On the other hand, using the Dormant Commerce Clause would lead to the conclusion that there would be no barrier – no excessive burden – if the online seller were sued in the state court of the purchaser or recipient, or if the non-paying purchaser were sued where the online seller is located. And in answering those questions, the existing lines between general and specific jurisdiction would become irrelevant, and the issue

of personal jurisdiction could be resolved without the kind of extensive and costly factual discovery that *McIntyre* seems to compel plaintiffs to undertake.

Turning to this case, petitioner does not dispute that it can be sued in California for Plavix purchased and used there, even though it did not itself make the sale directly to those consumers and the drug was not manufactured there. It presumably makes that concession because it directed a significant portion of its efforts to sell Plavix to California residents and thus could be sued there by them, even after *McIntyre*. In addition, the parties agree, at least for these purposes, that the substantive standard that California will apply to determine whether petitioner's drugs are defective is the same for both the resident and non-resident plaintiffs. Therefore, petitioner's obligations to design, label, and manufacture Plavix do not vary depending on where the drug was sold or consumed. Moreover, petitioner does not argue that the existence of intermediaries who actually sell Plavix to consumers alters its legal obligations because it has exclusive control over the alleged causes of the drug being defective. The company nonetheless objects to being sued in California by persons who consumed the drug elsewhere.

Petitioner admits, indeed embraces, the fact that it can be sued in other states, where the non-California plaintiffs ingested Plavix. Thus, the question under *Pike* is whether forcing the company to defend against the 575 non-California plaintiffs in California, instead of in the many

other states where it would be sued, is a clearly excessive burden on commerce. However, because petitioner will have to defend against 86 claims in California, and therefore means being subjected to very significant discovery and probably several trials there, it is hard to understand how the additional burden of responding to the remaining claims there, rather than in other fora outside its home jurisdictions, can be considered "excessive."

But if the determination of excessive burden depends in part on the state's reasons for supporting the joinder of these claims in its courts, two are apparent. First, and most prominent, is California's desire to help its residents in their cases in its courts, by enabling them to join forces with plaintiffs from other states, who will also be benefitted by the joinder of these claims. That will create greater efficiency in discovery and in the briefing of the legal and factual issues that must be decided. Second, consolidating more cases in a single state, as California allows here, may eliminate the need for litigation elsewhere over where injured consumers may sue. For example, given petitioner's narrow view of where injured plaintiffs can sue, a consumer who lived in one state when Plavix was first prescribed, and moved to another during the course of the treatment, may be met with personal jurisdiction objections that only serve to delay the case and impose burdens on the plaintiff and the courts – no matter in which state the suit was filed.

Moreover, although petitioner does not acknowledge the potential impact of its position, a ruling adopting its theory could make it impossible

to bring nationwide class actions for economic damages, even those that meet the requirements of Rule 23. Thus, a victory for petitioner here would re-open *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which considered only Due Process objections from the plaintiff's perspective. Under petitioner's theory, because the defendant in had no connection with the forum for the claims of many, if not most, of that class, the case could not be maintained there. Because California's interests in joinder are reasonable and proper, and because petitioner is already defending 86 claims in this case, the burden from defending all these claims here may be less than defending them separately and surely cannot be considered as "clearly excessive" under *Pike*.

There is one final reason why a Dormant Commerce Clause approach is preferable to one relying on Due Process. As the *Quill* Court recognized, a ruling that Due Process permits or precludes a state from acting, leaves no role for Congress when the claims are all based on state laws. By contrast, as *Quill* also recognized, under the Commerce Clause, Congress has very significant powers to prevent states from imposing undue burdens on interstate and foreign commerce, or it can impose conditions on a state's exercise of powers that have an impact on commerce. That fact is quite significant in this situation where petitioner and its amici express concerns not simply over California's exercise of personal jurisdiction over non-resident plaintiffs, but over how it applies some of its rules and practices to the alleged unfair disadvantage of out-

of-state defendants. Unlike a Due Process approach, which is all or nothing, a Commerce Clause approach would enable Congress to condition state court jurisdiction over out-of-state defendants on compliance with reasonable rules and practices, if it concluded that these objections had merit.

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Amicus recognizes that he is asking the Court to make a major change in its personal jurisdiction jurisprudence based on his conclusion that a shift from a Due Process to a Dormant Commerce Clause analysis would produce fairer, simpler, and more coherent results. However, if the Court is not prepared to go that far, at least it should ask whether the Dormant Commerce Clause would preclude the forum state from directly regulating the conduct at issue if it had occurred in that state. If the answer to that question is "No," as it would be in this case, then there should be no bar to a state adjudicating a lawsuit raising the propriety of that same conduct even when it has injured the plaintiff elsewhere.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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March 30, 2017

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR - 8 2016
OFFICE OF THE CLERK

No. 16-466

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
*Respondent.*

**On Writ of Certiorari to the California Supreme Court**

## BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS*[1]

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate public policies that encourage the discovery of medicines that help patients lead longer, healthier, and more productive lives. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates as amicus in cases, including by filing *amicus curiae* briefs with this Court in cases raising matters of significance to its members.

The question presented is critically important to PhRMA's members. Like the petitioner, they offer products or services nationwide and are frequently subject to claims of personal injury arising from the use of those products and services.

PhRMA's members include many pharmaceutical manufacturers that are not incorporated in California. These companies develop and sell medicines that are approved by the federal Food and Drug Administration for marketing throughout the United States and for use, as appropriate, by patients throughout the United States. Like the petitioner, these companies employ, often in each of the 50 states, representatives who are knowledgeable about

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs have been filed with the Clerk of the Court.

their prescription products to meet with and address the questions of prescribing physicians. Like the petitioner, these companies often develop, at their headquarters, nationwide marketing plans, consistent with the standardized drug labeling that FDA has approved to accompany the medicine nationwide. Many pharmaceutical companies have facilities in states other than their home state, such as research hubs in California that may focus on a particular disease or product line other than the one at issue in a particular plaintiff's case.

Pharmaceutical companies are routinely subject to litigation involving drugs that are marketed, sold, and distributed nationwide. FDA approval to market a drug generally reflects the FDA's judgment not that use of the drug is risk-free, but that the drug's benefits "outweigh their known risks" for the population as a whole.[2] But with any prescription drug, risks remain and individual experiences will vary. Because their products are widely used and rarely risk-free, pharmaceutical companies are frequently defendants in product liability cases that involve large numbers of plaintiffs in many states who assert that they and/or their doctors were exposed to nationwide sales and marketing campaigns.

Tens of thousands of individuals have filed such claims against PhRMA members just in the past five years. Many of those claims have been filed in the California state courts by out-of-state plaintiffs

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[2] *See* FDA, *Development and Approval Process (Drugs)*, http://www.fda.gov/Drugs/DevelopmentApprovalProcess/ (last updated Jan. 29, 2016) (explaining that the FDA's drug approval process "ensures that drugs, both brand-name and generic, work correctly and that their health benefits outweigh their known risks").

alleging injuries from events that occurred outside of California. By asserting specific jurisdiction over petitioner, the California Supreme Court departed from the predominant view that bars such jurisdiction in the absence of a causal relationship between the defendant's forum contacts and the plaintiff's claims.

PhRMA has a strong interest in the uniform application of standards for personal jurisdiction that comport with fundamental principles of due process. In resolving disputes over personal jurisdiction, this Court has consistently applied the Due Process Clause to protect the values of fairness and interstate federalism. The formless standard that California's high court has endorsed, however, fundamentally rejects those values. The decision below allows the California courts to become magnets for disputes with no causal connection to events in California. Magnet jurisdictions distort the development of the law and create uncertainty and unfairness for many of PhRMA's members, including those with similar, active litigation in California. PhRMA urges the Court to hold that the "arise out of or relate to" test for specific jurisdiction requires that defendant's in-state conduct cause the plaintiff's alleged injury.

## SUMMARY OF ARGUMENT

The decision below authorizes California state courts to exercise personal jurisdiction over nonresident defendants in disputes with nonresident plaintiffs that are not causally connected to alleged conduct or injury occurring in-state. For these disputes, the decision permits a California state court to serve, in effect, as a national court. Such a sweeping assertion of judicial power cannot be reconciled with either the limits that our system of

interstate federalism places on any one state court's exercise of judicial authority or the fundamental fairness in judicial proceedings that the Due Process Clause requires.

The limits on personal jurisdiction that the Due Process Clause imposes are inseparable from the limits that interstate federalism imposes on a State's ability to resolve disputes arising in other States. The Due Process Clause protects an individual's right to be subject only to a state court's lawful exercise of its judicial power. The scope of any state court's power, in turn, necessarily reflects the limitations inherent in one state court's power as compared to the power of other States. The courts of one State may not assert jurisdiction so broadly as to erode the ability of the courts of other States to serve as the expositors of their own State's laws. Such undue assertions of judicial power upset the balance of interstate federalism. A defendant therefore properly raises, under the Due Process Clause, a federalism-based concern to the scope of a state court's exercise of personal jurisdiction.

The federalism-based concerns here are substantial. This Court has long recognized, of course, that modern advances in technology, communications, and transportation minimize many of the logistical burdens that previously weighed against broad assertions of jurisdiction over nonresident defendants. But the Court also has repeatedly made clear that such advances have not erased, and could never erase, the significance of interstate boundaries for the proper operation of a federal system of coequal sovereign States. The decision below is antithetical to that system. It allows the courts of one State to become magnets of judicial authority, attracting lawsuits from around the

country involving parties and events that have no causal connection to that State. Even if a magnet court chooses to apply the laws of other States to these disputes, the inevitable reality is that the magnet State ends up arrogating to itself the primary role of determining "what the law is" for these other States. That assertion of power conflicts with the mutual respect for state sovereignty essential to interstate federalism.

The broad assertion of jurisdiction below also denies an out-of-state defendant the fundamental fairness in judicial proceedings that due process also protects. Allowing claims to proceed in the courts of a State with no causal connection to the claims can meaningfully limit a defendant's ability to fairly present its case. It is often the case in a dispute over product liability, for example, that a plaintiff's treating physician will be a key witness. Yet if the trial is held in a State where neither the plaintiffs nor their physicians reside, the defendant will be unable to subpoena these key witnesses to testify at trial, as they could if the matter were properly brought in the State in which the dispute actually arose.

The decision below stretches the "arise out of or relate to" element of specific jurisdiction farther than any decision of this Court has ever permitted. The essential distinction between general and specific jurisdiction has always been that general jurisdiction extends to cases in which there is no causal connection between the nonresident's forum contacts and the plaintiff's claim; specific jurisdiction does not. The approach below eliminates that distinction by permitting any forum contacts to suffice for specific jurisdiction in a case involving a product marketed and sold nationwide. It thus nullifies the limiting

effect of the rule, most recently set forth in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), that a corporation is subject to general jurisdiction only where it is essentially at home. If a state court can assert specific jurisdiction in all cases involving a nonresident manufacturer's products, regardless of where the events causing the alleged injury took place, and regardless of where the manufacturer is at home, *Daimler* will be undone. This Court should confirm that specific jurisdiction requires a causal connection between the nonresident defendant's forum contacts and the events giving rise to a nonresident plaintiff's claim.

## ARGUMENT

### THE COURTS OF ONE STATE MAY NOT CONSTITUTIONALLY SERVE AS NATIONAL COURTS FOR RESOLVING OUT-OF-STATE DISPUTES

Enforcement of due process limits on personal jurisdiction serves "two related, but distinguishable, functions." *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980). One function is to "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292. The other is to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum." *Id.* The broad approach to specific jurisdiction adopted below eviscerates both of these core functions.

In determining the scope of personal jurisdiction, moreover, this Court's longstanding approach has been to separately evaluate the grounds for general jurisdiction and for specific jurisdiction. The

distinction between these two grounds for personal jurisdiction has turned on the presence or absence of a causal connection between the claims at issue and the defendant's forum contacts. Where a sufficient causal connection exists, the analysis has been one of specific jurisdiction. In the absence of a causal connection, the Court has evaluated the criteria for establishing general jurisdiction. By dispensing with any causation requirement for establishing specific jurisdiction, the decision below effectively destroys this Court's longstanding analytical framework for evaluating personal jurisdiction and creates an all-purpose general jurisdiction based on contacts insufficient to satisfy the Court's "at home" requirements.

### A. Due Process Limitations On Personal Jurisdiction Necessarily Reflect Considerations Of Interstate Federalism.

Principles of interstate federalism and due process are inextricably intertwined. A defendant has the right, under the Due Process Clause, to be subject only to a state court's lawful exercise of judicial power. Whether any such exercise of judicial power is lawful, however, depends in significant part on whether the state court has authority, consistent with the constraints of federalism, to render its judgment.

The scope of any State's sovereign power is limited by the scope that the Constitution reserves to other States in the federal system. For example, if each State, pursuant to the Full Faith and Credit Clause, Article IV Section 1, is to respect the judgments and "judicial Proceedings" of other States, then no single State may intrude unduly on the judicial authority of other States. Similarly, the Supremacy Clause of Article VI affords to the Federal Government, but not

any one State, the right to supersede another State's laws. And the Tenth Amendment reserves rights to each State "respectively" rather than to the States collectively. Under the Constitution, therefore each State may exercise its sovereign authority only to the extent it does not infringe the authority of its "coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. The Court's personal jurisdiction decisions have long recognized this fundamental limitation on state judicial power.

1. In *International Shoe*, the Court held that a state court had personal jurisdiction over a Delaware corporation, which employed sales personnel in and shipped orders to the forum state, for a suit to collect taxes owed to the state's unemployment compensation fund. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 311-14, 320 (1945). The decision established the principle that a state court may assert jurisdiction in a case arising out of a nonresident defendant's activities within the territorial borders that State. It was fair within a federal system for a state court "to enforce the obligations which [the nonresident defendant] ha[d] incurred" in that State. *Id.* at 321.

*International Shoe* was a "momentous departure" from the "rigidly territorial focus" that had previously guided the Court's decisions. *Daimler*, 134 S. Ct. at 755; see *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) ("The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."). Nothing in *International Shoe* suggested, however, that one state court could enforce obligations that a nonresident defendant had incurred in a different state. Far from rejecting all limitations on state sovereignty, the Court arrived at the "minimum contacts" test by considering how "the demands of due process," could

be met "in the context of our federal system of government." 326 U.S. at 317.

This Court's subsequent decisions in *McGee* and *Hanson* confirmed that technological advances did not eliminate all consideration of interstate federalism as a limitation on personal jurisdiction. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson v. Denckla*, 357 U.S. 235 (1958). In *McGee*, the Court held that a California state court properly exercised jurisdiction over a Texas insurance company that mailed a life insurance policy offer to a California resident who then purchased the policy and paid premiums from California. 355 U.S. at 221-23. The suit, in which the policy beneficiary attempted to recover on the policy the company refused to pay, was "based on" these contract-related contacts with California. *Id.* at 223. The decision noted that advances in the national economy, transportation, and communication had spurred a "trend" of expanding personal jurisdiction over nonresidents. *Id.* at 222-23. But technological progress has made it only "less burdensome" for a nonresident to litigate in a distant forum (*id.*); it did not eliminate all interstate federalism concerns.

If any doubt persisted after *McGee* about the continuing relevance of state territorial limits to personal jurisdiction, the decision the following year in *Hanson* eliminated it. *Hanson* involved the heirs of a decedent who had executed a trust in Delaware and appointed a Delaware entity as the trustee while she was living in Pennsylvania. 357 U.S. at 238. Although the decedent died in Florida, the Court held that the Florida court lacked jurisdiction over the Delaware trustee because the cause of action did not "arise out of an act done or transaction consummated" in Florida. *Id.* at 251-55. In so holding, the

Court confirmed that *International Shoe*'s "flexible standard" did not "herald[] the eventual demise of all restrictions on the personal jurisdiction of state courts." *Id.* at 251. As the Court explained, "[t]hose restrictions are more than a guarantee of immunity from inconvenient or distant litigation" because "[t]hey are a consequence of territorial limitations on the power of the respective States." *Id.*

*World-Wide Volkswagen* provided further confirmation that territorial borders still impose important constraints upon the jurisdiction of a sovereign State's courts. There, the Court held that an Oklahoma court lacked jurisdiction over an automobile distributor and a retail dealer—both incorporated and operating primarily in New York—in a claim involving a car accident in Oklahoma. The Court acknowledged that the economic trends described in *McGee* had "only accelerated." *World-Wide Volkswagen*, 444 U.S. at 293. But to "remain faithful to the principles of interstate federalism embodied in the Constitution," modern advances could not render "state lines . . . irrelevant for jurisdictional purposes." *Id.* Preventing the erosion of interstate federalism was still fundamental to personal jurisdiction because

> [T]he Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

*Id.* Thus, the majority in *World-Wide Volkswagen* focused on the "defendant's conduct and connection

with the forum State," *id.* at 297, and rejected a test rooted in the contacts of the disputed product, which could cross state lines, see *id.* at 318-19 (Blackmun, J., dissenting).

Sovereignty-based limits on personal jurisdiction were also important to the plurality decision in *Nicastro*. There, the Court held that a New Jersey court lacked jurisdiction over a British manufacturer of a machine alleged to have injured a metal worker in New Jersey. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011) (plurality). The manufacturer did not market in or sell goods to New Jersey, but the machine ended up in New Jersey through a U.S. distributor. *Id.* at 878. The plurality confirmed the role of sovereign authority in the personal jurisdiction analysis, *id.* at 882, explaining that "due process protects the individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it." *Id.* at 884 (citation omitted).

Finally, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), the Court observed that specific jurisdiction requires "an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* (internal citation and alteration omitted). Although the focus of *Goodyear* was on general jurisdiction, the Court approved the North Carolina court's conclusion that it lacked specific jurisdiction because the bus accident at issue occurred in France and the tire which allegedly caused the accident was manufactured in Turkey. In so holding, *Goodyear* confirmed the principle that a state court may assert jurisdiction

based on a nonresident defendant's activities that "take[] place" within the forum's territorial boundaries because those activities are properly subject to the "State's regulation." *Id.* That is the same principle that *International Shoe* recognized more than 70 years ago when it considered how "the demands of due process" could be met "in the context of our federal system of government." *Int'l Shoe*, 326 U.S. at 317.

2. Some of this Court's opinions have emphasized that the "ultimat[e]" focus of the Court's inquiry into personal jurisdiction is the scope of a defendant's liberty interest under the Due Process Clause, rather than state sovereignty. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 & n.10 (1982); *Shaffer v. Heitner*, 433 U.S. 186, 204 & n.20 (1977).

Fairly read, however, both in isolation and in the broader sweep of this Court's decisions, these cases neither hold nor counsel that interstate federalism may be disregarded in the personal jurisdiction analysis. Rather, the concepts of federalism and the defendant's liberty interest are mutually reinforcing. It would infringe a defendant's liberty interest under the Due Process Clause, for example, to be subjected to a state court judgment that was beyond the authority of a state court to issue. In assessing a defendant's rights under the Due Process Clause, therefore, a court may appropriately determine whether it would be acting in excess of its authority to assert jurisdiction over a nonresident defendant—including its authority as measured relative to the authority of other States. *World-Wide Volkswagen*, 444 U.S. at 294. No other approach could be consistent with interstate federalism, because, as

*Shaffer* acknowledged, States "are defined by their geographical territory." *Shaffer*, 433 U.S. at 204 n.20. Thus, "restrictions on the personal jurisdiction of state courts" ultimately "are a consequence of territorial limitations on the power of the respective states." *Hansen*, 357 U.S. at 251; see *Ins. Corp. of Ir.*, 456 U.S. at 702 n.10 (acknowledging that "the requirements of personal jurisdiction, as applied to state courts, reflect an element of federalism and the character of state sovereignty vis-à-vis other States"); *Burger King*, 471 U.S. at 473 n.13 (stating that personal jurisdiction limits "operate[] to restrict state power"); see also A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. Chi. L. Rev. 617, 637-42 (2006).

That a defendant may waive its objection to jurisdiction in a particular case does not undermine the importance of federalism in limiting a state court's exercise of judicial power. In *Insurance Corporation of Ireland*, the Court noted that a limitation on sovereign power cannot be waived. See *id.* at 456 U.S. at 702 n.10 ("[i]ndividual actions cannot change the powers of sovereignty"). One defendant's waiver of personal jurisdiction, however, does not alter a sovereign's power. Precisely because a defendant's protection is rooted in the Due Process Clause, a defendant's waiver means only that the defendant is waiving a personal due process right. See Spencer, *supra*, at 639-40. One defendant's waiver of its own due process rights cannot deprive another defendant of its right to challenge the same state court's authority relative to the sovereignty of other States. Respect for the values of interstate federalism thus underlie and help define the scope of the individual liberty interest.

3. The disruption to interstate federalism that the decision below approves is substantial. Thousands of nonresident plaintiffs already have claims pending in California courts against nonresident pharmaceutical manufacturers, and if the Court affirms the decision below, thousands more such claims inevitably will follow. Product liability cases are legion, and the core facts cited to support specific jurisdiction in the decision below are found in many other product liability cases involving other pharmaceutical companies.

For example, the majority concluded that "BMS's nationwide marketing, promotion, and distribution of Plavix" created the "substantial nexus" between the nonresident plaintiffs' claims and BMS's contacts with California. Pet. App. at 28a. PhRMA's members engage often in some form of nationwide marketing, promotion, and distribution of their drugs. The majority also cited BMS's "other activities" in California, such as the maintenance of research and development facilities unrelated to the development of the drug at issue, Plavix. *Id.* at 5a-6a, 32a. Many of PhRMA's members have facilities in California that conduct activities unconnected to events that out-of-state plaintiffs allege cause their injuries. Because the same facts that supported specific jurisdiction in petitioner's case will be present in many cases involving PhRMA's members, the rule applied below permits California courts to function as the national courts for pharmaceutical products litigation that properly belongs in the jurisdiction in which the alleged events at issue occurred, not California.

The instant case is but one example among many in which California courts are entertaining claims that collectively involve thousands of out-of-state plaintiffs against nonresident pharmaceutical companies. A

recent study of more than 2,900 cases filed against pharmaceutical companies in Los Angeles and San Francisco counties between January 2010 and May 2016, showed that these complaints combined the claims of over 25,000 individual plaintiffs, and that only 10.1% of these individuals were California residents.[3] The remaining 89.9%—over 20,000 individual claimants—were residents of another state.[4] California state courts are thus effectively acting as national courts in pharmaceutical product litigation not just for the many out-of-state plaintiffs who have sued BMS in cases involving Plavix, but for thousands of claims by other out-of-state plaintiffs against other out-of-state manufacturers in cases involving a variety of other pharmaceutical products. This assertion of judicial power intrudes on the sovereign authority of other States to create and enforce their own laws. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982); *Shaffer*, 433 U.S. at 225 (A court that "appl[ies] the law of a different forum" is "less interested in fostering the policies of that foreign jurisdiction, than would the courts established by the State that provides the applicable law.") (Brennan, J., concurring).

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[3] Ryan Tacher, Civil Justice Ass'n of Cal., *Out-of-State Plaintiffs: Are Out-of-State Plaintiffs Clogging California Courts?* 2 (2016), http://cjac.org/what/research/CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf.

[4] *Id.*

### B. Allowing One State's Courts To Serve As National Courts In Products Liability Cases Undermines The Fair And Orderly Administration Of The Laws.

The decision below disrupts the "fair and orderly administration of the laws" that the Due Process Clause also serves to ensure. *Int'l Shoe*, 326 U.S. at 319.

For corporations with operations across state lines, fairness requires that courts heed the "essential difference between case-specific and all-purpose (general) jurisdiction." *Goodyear*, 564 U.S. at 927. Where a corporation is "essentially at home," it is fair for the courts to assert personal jurisdiction over the corporation in any lawsuit. *Id.* at 919. Elsewhere, however, the assertion of personal jurisdiction depends on "an affiliation between the forum and the underlying controversy." *Id.* (alteration omitted). And "even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to *those sales*." *Id.* at 931 n.6 (emphasis added). The distinction between general and specific jurisdiction thus provides "minimum assurance" to corporations with sales in all 50 states about where they will be liable to suit. *World-Wide Volkswagen*, 444 U.S. at 297. By effectively eliminating that distinction, however, the decision below renders the exercise of personal jurisdiction wholly uncertain and unpredictable.

The decision below compounds uncertainty about jurisdiction for companies that market their products nationwide, and particularly for pharmaceutical companies. *Daimler* acknowledged that predictability is an important aspect of due process; even corporations with nationwide sales are entitled to some "minimum assurance[s]" about where their

conduct will render them liable to suit. *Daimler*, 134 S. Ct. at 760-62; see also *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Predictability is valuable to corporations making business and investment decisions."). *Daimler* provided those minimum assurances by confirming that a corporation is subject to general jurisdiction where it is essentially at home, typically in the States where the corporation is incorporated or has a principal place of business. *Daimler*, 134 S. Ct. at 760-61. The Court explained that these "affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Id.* at 760 (citing *Hertz Corp.*, 559 U.S. at 94 ("Simple jurisdictional rules . . . promote greater predictability."). But in state courts with expansive views of how to apply the "arise out of or relate to" standard for personal jurisdiction, *Daimler*'s limits on general jurisdiction are simply mooted for companies with nationwide sales and marketing. As the dissent observed, an expansive view of specific jurisdiction "subject[s] companies to the jurisdiction of California courts to an extent unpredictable from their business activities in California." Pet. App. at 50a (Werdegar, J., dissenting).

If the Court were to accept Respondents' view, then every State with a long-arm statute that extends to the limits of Due Process would be free to apply California's standard. The problems the dissent identified below may then expand beyond a few state courts with expansive views, and could create pervasive conflicts nationwide, because many States permit their courts to exercise specific jurisdiction up to the constitutional limits.

It is no answer to say that all national sellers can predict that they will be sued in every court in the

land, because there is no predictable relationship between the distribution of a company's product across the 50 states and the company's product liability cases. See Pet. App. at 79a (Werdegar, J., dissenting). Nor can companies predict which courts will become magnet jurisdictions and how disproportionate their impact on product liability law may become.

For example, pharmaceutical companies have faced thousands of personal injury claims in the City of St. Louis, another magnet jurisdiction with state courts that have expansively construed personal jurisdiction. None of the defendants in those cases is "at home" in Missouri, and the vast majority of the claims against them have been brought by out-of-state residents. See, *e.g.*, *Lovett v. Pfizer Inc.*, No. 1422-CC00225-01 (St. Louis Cir. Ct. Mar. 27, 2014) (three in-state plaintiffs and 88 out-of-state); *Anthony v. Bayer Corp.*, No. 1622-CC09415 (St. Louis Cir. Ct. June 10, 2016) (nine in-state plaintiffs and 86 out-of-state); *Hogans v. Johnson & Johnson*, No. 1422-CC09012-01 (St. Louis Cir. Ct. Sept. 29, 2014) (two in-state plaintiffs and 63 out-of-state).[5]

Relying upon *Daimler*, the Missouri Supreme Court just issued a decision that could foreclose further use of the Missouri state courts as a magnet for out-of-

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[5] Plaintiffs flocked to the City of St. Louis because of its reputation for denying motions to dismiss, providing little gatekeeping on expert testimony or other evidentiary restrictions, affording a jury pool friendly to plaintiffs, and upholding outsized verdicts; of the top six product defect verdicts in the United States in 2016, half came out of the St. Louis court. *See* Margaret Cronin Fisk, *Welcome to St. Louis, the Hot Spot for Litigation Tourists*, BloombergBusinessweek (Sept. 29, 2016), https://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis.

state disputes. In *State ex rel. Norfolk Southern Railway v. Dolan*, No. SC95514, 2017 WL 770977 (Mo. Feb. 28, 2017) (en banc), the court held that a St. Louis County court lacked jurisdiction over a Virginia railway company that operates tracks in Missouri because the Indiana plaintiff's personal injury claims related to his work in Indiana, and hence did not "arise out of" the defendant's activities in Missouri. *Id.* at *1. In so holding, the court rejected the argument, functionally identical to that accepted below, that a state court could assert jurisdiction over a "national company" because the company does the "same 'type' of business in the forum state as in the rest of the country." *Id.* at *6. "Such an argument goes even further than the pre-*Daimler* approach to *general* jurisdiction . . . . turn[ing] specific jurisdiction on its head." *Id.* The Missouri Supreme Court's analysis is persuasive, and further illustrates how far the decision below has strayed from settled understandings of the scope of personal jurisdiction.

By filing suit in a State with no causal connection to the plaintiff's injury, a plaintiff can effectively limit a pharmaceutical company's ability to put on a full and fair defense. In many pharmaceutical product liability cases, for example, the outcome can turn on the availability of testimony from an independent witness – the plaintiff's prescribing physician. The prescribing physician can testify authoritatively as to the information she had about the risks and benefits of the drug and how she weighed those risks and benefits before deciding to prescribe the drug to the plaintiff. Such testimony is, as a matter of state law, often critical to the assessment of liability. See, *e.g.*, *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1116 (1996) ("[I]n the case of prescription drugs, the duty to warn runs *to the physician*, not to the patient.");

*Valentine v. Baxter Healthcare Corp.*, 68 Cal. App. 4th 1467, 1483 (1999) ("In the case of prescription drugs . . . it is through the physician that a patient learns of the properties and proper use of the drug . . . ."). And because juries typically do not view physicians as aligned with either of the parties, a physician's testimony is often critical to the jury's resolution of the merits. The testimony of the plaintiff's prescribing physician thus often plays a central role in a pharmaceutical company's defense of product liability cases.

State courts are limited, however, in their power to compel out-of-state witnesses to appear at trial. A California court, for example, has no power to compel nonparty witnesses from other states to appear at trial in California. See Cal. Code Civ. Proc. § 1989. Such limitations are common and reflect longstanding limits on the judicial power of state sovereigns that modern minimum contacts analysis does not overcome for nonparty witnesses, such as physicians, in civil trials. See, *e.g.*, *Colo. Mills, LLC v. SunOpta Grains & Foods Inc.*, 269 P.3d 731, 733 (Colo. 2012) (holding that "as a matter of state sovereignty," Colorado courts "have no authority to enforce civil subpoenas against out-of-state nonparties"); Marc Fuller, *Jurisdictional Issues in Anonymous Speech Cases*, 31 Comm. Law. 24, 26 (2015) ("[S]ubpoena power is governed by the 'strict territorial approach' of *Pennoyer v. Neff*."). While the defense can play videotaped excerpts of a discovery deposition of an out-of-state witness, the inability to tailor the trial examination to the key issues brought forth at the trial itself is a severe limitation on an effective defense. Not being able to compel the presence of a key witness at trial is plainly one of the "burdens of litigating in a distant or inconvenient

forum," *World-Wide Volkswagen*, 444 U.S. at 292, and one that the decision below imposes en masse without regard to its negative impact on the fundamental fairness of the trial of product liability cases.

State court overreaching also diminishes the role of the federal courts in hearing cases of national significance. As Congress acknowledged in the Class Action Fairness Act ("CAFA"), the "intent of the framers" was that federal courts would hear "interstate cases of national importance." Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005) (codified at 28 U.S.C. § 1711 (note)). A federal forum is important for defendants because state and local courts sometimes engage in "[a]buses," including "keeping cases of national importance out of Federal court," "acting in ways that demonstrate bias against out-of-State defendants;" and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." *Id.* § 2(a)(4), 119 Stat. at 5.

Congress intended CAFA to address these issues in part by allowing defendants to remove mass actions to federal court under a variety of circumstances. *Id.* § 5(a), 119 Stat. at 12-13 (codified at 28 U.S.C. § 1453(b)). Out-of-state plaintiffs often evade CAFA, however, by filing a series of otherwise identical complaints that each names fewer than 100 plaintiffs. For example, the hundreds of plaintiffs in the Plavix matters in California were spread across eight complaints to avoid triggering the "mass action" provisions of CAFA.[6]

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[6] *See, Caoutte v. Bristol-Myers Squibb Co.*, No. 12-1814, slip op. at 10-13 (N.D. Cal. Aug. 10, 2012) (Order Granting Plaintiffs' Motion To Remand) (ECF No. 56).

Similarly, such plaintiffs attempt to defeat removal jurisdiction by naming an in-state entity, such as a distributor, as a defendant even in situations where there is no actual connection between the in-state entity and the out-of-state plaintiffs. See Pet. App. at 59a (Werdegar, J., dissenting) (describing the majority's reference to McKesson as "perhaps the ruddiest" of all "the majority's red herrings" because "at no point have real parties argued McKesson bore any responsibility in providing them Plavix.").[7]

Even when defendants expose such jurisdictional gerrymandering as improper, litigating the issues wastes resources and disrupts the orderly administration of the law.[8] When jurisdictional rules permit courts to find jurisdiction based on a nonresident defendant's relationship with an in-state entity whose conduct is itself unrelated to the suit, it defeats diversity's jurisdiction's basic rationale of "opening the federal court doors to those who might otherwise suffer from local prejudice." *Hertz*, 559 U.S. at 85. Indeed, predictable jurisdictional rules are critical to avoid otherwise wasteful litigation over the threshold question of *where* a case may properly be litigated. The formless test applied below exemplifies the problem that unclear jurisdictional rules create and endorses a form of jurisdictional piggybacking

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[7] Docket searches indicate that McKesson has been named as a defendant in 795 of the 1,499 products liability cases filed against pharmaceutical companies in Los Angeles County in the past five years.

[8] *See, e.g., In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 2014 U.S. Dist. LEXIS 67675, at *11 (E.D. Pa. May 15, 2014) (concluding six years after the issue was first raised that the case was "mature enough" to determine that McKesson was misjoined).

that distorts our federal system and the jurisdictional rules Congress has established.

### C. The Court Should Reject Any Test For Specific Jurisdiction That Does Not Require A Causal Connection Between The Defendant's Conduct In The Forum State And The Plaintiff's Claim.

The assertion of specific jurisdiction should rest, at a minimum, upon a causal connection between the defendant's conduct in the forum state and the plaintiff's claim. The need for such a requirement is inherent in the distinction this Court has drawn between general and specific jurisdiction.

In *Daimler,* this Court placed meaningful constraints on the scope of general jurisdiction by limiting the exercise of such jurisdiction to the State or States in which a corporation is "at home." 134 S. Ct. at 751, 760-62. The premise of *Daimler* is that, where there is no causal connection between the defendant's conduct in the forum state and the plaintiff's claims, the assertion of personal jurisdiction may be grounded only upon the defendant's more general conduct that rendered it at home in the forum state. *Daimler* provides a measure of predictability to corporations because it focuses on corporate "affiliations [that] have the virtue of being unique—that is, each ordinarily indicates only one place." *Id.* at 760. This limitation provides the "minimum assurances" to corporations as to where conduct will and will not render them liable to suit that the Due Process Clause requires. *Id.* at 762.

Under the decision below, however, the limitations on general jurisdiction effectively serve no purpose at all. By refusing to limit specific jurisdiction to cases involving a causal connection between the defen-

dant's conduct in the forum and the plaintiff's claims, the decision below expands specific jurisdiction to cover the very types of disputes over which the Court made clear in *Daimler* were off limits to state courts under the rubric of general jurisdiction.

The Court's decisions involving specific jurisdiction reflect the premise that a causal connection is a prerequisite for the exercise of specific jurisdiction. As the dissent below recognized, "[o]f the post-*International Shoe* decisions in which the high court actually found a factual basis for specific jurisdiction, each featured a direct link between forum activities and the litigation." Pet. App. 53a-54a (Werdegar, J., dissenting). See *Int'l Shoe*, 326 U.S. at 311-14, 320 (nonresident defendant's employment of salespeople in the forum and systematic fulfillment of orders solicited by those salespeople were causally connected to claim of unpaid employment taxes in that forum); *McGee*, 355 U.S. at 221-23 (nonresident defendant's mailing of life insurance policy to the forum and receipt of payments from the forum were causally connected to a claim for recovery under the policy); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 772, 776-77, 780 (1984) (nonresident defendant's sale of magazine in the forum was causally connected to plaintiff's claim of libel including harm to her reputation in New Hampshire); *Calder v. Jones*, 465 U.S. 783, 785-86, 788-89 (1984) (nonresident defendants' publication of an article, including visits and calls to the forum and reliance on sources from the forum, was causally connected to the plaintiff's libel claim); *Burger King*, 471 U.S. at 479-81 (nonresident defendants' negotiations and formation of a franchise agreement with a franchisor in the forum, sending of payments to the forum under the agreement, purchase of equipment in the forum, and

acceptance of regulations from the franchisor in the forum were causally connected to a claim for breach of the franchise agreement).

The phrase "arise out of or relates to" thus has been applied as a test that requires causation, and that distinguishes specific jurisdiction from general jurisdiction. Any more elastic interpretation, resting on the potentially infinite capacity to draw relationships between acts, eliminates any meaningful limitation on the scope of personal jurisdiction. As Justices Scalia and Ginsburg observed in another context, applying a rule based on the phrase "relates to" is a "project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). For this reason as well, the Court should hold that specific jurisdiction requires a causal connection between the defendant's in-forum conduct and the plaintiff's claims.

Finally, a causal connection for specific jurisdiction is essential to provide predictability and proportionality for companies that sell their products nationwide. They could anticipate, for example, that the volume of product litigation in any state where they are not at home would be proportional to their sales in that state. Similarly, they would know that the use of a California-based distributor whose conduct is causally unrelated to product-liability claims would not permit a California court to assert personal jurisdiction over the manufacturer. See *Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980) ("The assertion of jurisdiction over [one defendant] based solely on the activities [another defendant] . . . . is plainly unconstitutional."). Without a causation

requirement, nonresident defendants are at risk of being subject to personal jurisdiction whenever they have an in-state distributor, which is "an outcome that would sweep beyond even the sprawling view of general jurisdiction . . . rejected in *Goodyear*." *Daimler*, 134 S. Ct. at 760.

## CONCLUSION

For the foregoing reasons and those stated by Petitioner, the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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March 8, 2017

RECORD AND BRIEFS

No. 16-466

Supreme Court, U.S.
FILED
MAR - 8 2016
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, et al.,

*Respondents.*

**On Writ Of Certiorari To The California Supreme Court**

## BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER BRISTOL-MYERS SQUIBB COMPANY

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## INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a nonprofit association with 94 corporate members representing a broad cross section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate voting membership that spans a diverse group of industries in various facets of the manufacturing sector. (See e.g., the list of PLAC's corporate members attached hereto as Appendix "A"). In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

This case provides an opportunity for the Court to articulate clear limits on the assertion of personal jurisdiction over nonresident manufacturers in cases

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[1] All parties have submitted to the Clerk letters granting blanket consent to the filing of *amicus* briefs. Pursuant to S. Ct. Rule 37.6, PLAC states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than PLAC, its members, or its counsel, has made a monetary contribution toward preparation or submission of this Brief of *Amicus Curiae*.

where the claims of nonresident plaintiffs arise entirely outside the forum state. PLAC submits this brief in support of Petitioner Bristol-Myers Squibb Company ("BMS") because such assertions of personal jurisdiction over nonresident defendants unfairly prejudice manufacturers and do not bear the mantle of fair play and substantial justice which is the hallmark of the Due Process Clause.

## SUMMARY OF ARGUMENT

Recognizing the due process limits on states' exercise of specific jurisdiction, this Court has required a connection between the location of a company's conduct and the place where it may be subject to suit arising out of that conduct. In the present case, the California Supreme Court did not require the nonresident plaintiffs' claims to have arisen out of BMS's activities within California; instead, the court found a sufficient level of connection because BMS's alleged conduct in California was similar to its alleged conduct in other places where the claims actually arose. For this reason, the California court's standard impermissibly severed the connection due process requires between the place of a company's conduct and place where it may be sued for that conduct.

Moreover, as also recognized by this Court, a defendant has a liberty interest under the Due Process Clause in being able to predict a relationship between its conduct and where it may be sued for that conduct.

Manufacturers of all sizes have a practical need for predictability in order to make informed decisions. By allowing personal jurisdiction to turn largely on the unilateral preferences of plaintiffs, rather than the location of defendants' conduct that is sued upon, the California Court's standard deprives defendants of the predictability required by due process.

The inevitable result of such a standard in many cases is forum-shopping by claimants and a corresponding clustering of suits in courts viewed as the most plaintiff-friendly. PLAC's members and other manufacturers increasingly face large numbers of lawsuits simultaneously pursued by hundreds of plaintiffs who choose to aggregate their cases in "magnet" jurisdictions with no meaningful connection to the events at issue.[2] The disproportionate clustering of such suits in the most plaintiff-friendly courts, which are typically far removed from the key evidence and witnesses, unfairly increases the expense, risks and burdens of litigation for the nonresident manufacturers. The resulting disproportionate liability and defense costs will in the first instance be harmful to the manufacturers, but will ultimately be borne by consumers in the form of higher product prices.

This Court has also recognized that since states are co-equal sovereigns, fundamental constitutional

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[2] As used herein, the term "magnet jurisdictions" refers to courts that attract a disproportionately large number of lawsuits against nonresident defendants filed by nonresident plaintiffs and involving claims arising in other states.

principles of federalism limit state courts' extraterritorial assertions of jurisdiction, and a jurisdictional assertion that exceeds a state's proper powers violates a nonresident defendant's due process rights. The standard applied by the California Supreme Court permits a state court to become the national arbiter of the rights of people residing, and affected by conduct in other states, thereby exceeding the proper territorial reach of the state's powers.

Finally, the California court's standard will be harmful to manufacturers, even of the small "mom and pop" variety. Under the court's analysis, a nonresident defendant's "nationwide marketing" of a product can be sufficient to allow the forum state to assert specific jurisdiction over product claims arising entirely in other states because the manufacturer also engages in similar conduct – i.e., the national advertising – in the forum. The reality today, however, is that almost all manufacturers, whether large or small, advertise their products on the internet, a practice that can be characterized as "nationwide marketing." Accordingly, the California court's standard would permit aggregation of claims related to virtually any product in the most plaintiff-friendly "magnet" jurisdictions, to the considerable prejudice of manufacturers, and ultimately consumers. And in response to this standard, courts outside the United States may elect to exercise reciprocal and retaliatory jurisdiction over claims against American companies that arise entirely in the United States, to the further detriment of manufacturers and their customers.

## ARGUMENT

### I. THE SIMILARITY STANDARD APPLIED BY THE CALIFORNIA SUPREME COURT VIOLATES DUE PROCESS

#### A. The Standard Impermissibly Severs the Connection Required by Due Process Between the Place of a Manufacturer's Conduct and Place Where It May Be Subject to Suit for That Conduct

Where, as here, all the conduct and occurrences giving rise to a plaintiff's claims against a manufacturer take place outside California, and the manufacturer is not at home in California, it logically follows that the manufacturer should not be forced to defend those claims in California. "[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011).

A nonresident manufacturer's business activities in California should not subject it to litigation in that state for claims that do not arise out of that activity. Only when a company's contacts with a forum state are so extensive that it is essentially at home there, is it subject to the forum court's general jurisdiction over it for any and all claims. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Such all-purpose jurisdiction may not be based on a company's general business activities within a state, even when those activities are "substantial, continuous, and

systematic." *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014). Instead, "only a limited set of affiliations with a forum" will render a defendant at home there. *Id.* at 760. "[T]he place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'" *Id.*

If a defendant's substantial, continuous, and systematic activities within a state are not sufficient to confer general jurisdiction, it logically follows that, they are likewise insufficient for specific jurisdiction. See e.g., *Goodyear*, 564 U.S. at 927 ("A corporation's 'continuous activity of some sorts within a state,' *International Shoe* instructed, 'is not enough to support the demand that the corporation be amenable to suits unrelated to that activity'").[3]

As compared to general jurisdiction, specific jurisdiction is "a more limited form of submission to a State's authority" that applies when disputes with a nonresident defendant "'arise out of or are connected with' [the defendant's] 'activities within the state.'" *Nicastro*, 564 U.S. at 881 (*quoting International Shoe Co.*, 326 U.S. at 319). Although a defendant may, by its conduct, submit to the judicial power of an otherwise foreign sovereign for purposes of specific jurisdiction, it only does so "to the extent that power is exercised *in connection with the defendant's activities touching on*

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[3] *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 318 (1945).

*the State*." *Nicastro*, 564 U.S. at 881 (emphasis added).[4] Thus, whether a court may lawfully assert specific jurisdiction over a nonresident manufacturer turns on the connection between its conduct within a forum and the conduct giving rise to the lawsuit.

This case concerns the appropriate standard for determining when a nonresident defendant's forum activities are sufficiently connected to a plaintiff's claims for an assertion of specific jurisdiction. A test that requires a mere relationship between a manufacturer's in-forum conduct and its out-of-forum conduct provides little, if any, practical limitation to a court's assertion of personal jurisdiction over any manufacturer having some connections with the forum state. Since all company activities are in some sense related to each other, anything a company does outside a given state will always bear some relationship to its activities within a forum state, even if that relationship is attenuated and indirect. PLAC agrees with BMS that assertions of specific jurisdiction ought to be limited to instances where the defendant's in-forum conduct is also the alleged proximate cause of the plaintiff's alleged injury or loss.

In its decision below, the California Supreme Court did not require that a plaintiff's claim arise out of defendant's in-forum conduct. Instead, it found that a much less direct relationship between the alleged

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[4] In the criminal context, the Constitution requires that a defendant be subject to proceedings only in "the State and district wherein *the crime shall have been committed*." U.S. Const. Amend. VI (emphasis added).

injury and the defendant's in-forum conduct was sufficient. Although the court purported to require a "substantial connection" between the nonresident plaintiffs' claims and BMS's California activities, the actual relationship it required was one of mere similarity. See e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 896 (2016) (Werdegar, J., dissenting) (noting that the majority's connection argument "rests on similarity of claims and joinder with California plaintiffs").[5]

As a result, a California court was permitted to assert specific jurisdiction over a nonresident defendant sued by hundreds of nonresident plaintiffs for injuries, and conduct, occurring outside California. Such an expansive assertion of jurisdiction is *not* "exercised in connection with the defendant's activities touching on the State," *Nicastro*, 564 U.S. at 881, and hence violates due process.

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[5] The majority below found that "'[a] claim need not arise directly from the defendant's forum contacts'" and that specific jurisdiction could be based "on a less direct connection between BMS's forum activities and plaintiffs' claims" such as its sale of Plavix to *other* persons in California. *Id.* at 885 and 889.

### B. The Standard Deprives Manufacturers of the Predictability Required by Due Process and Permits Forum-Shopping to Aggregate Suits in Plaintiff-Favorable "Magnet" Jurisdictions

The Due Process Clause requires "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). "Indeed, the point of due process – of the law in general – is to allow citizens to order their behavior." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). These due process limitations ensure that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

"Predictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). In order to make informed risk management decisions, companies have a practical need to be able to predict where their conduct will subject them to suit. A 2015 Survey of 1,203 in-house general counsel, attorneys and executives conducted for the United States Chamber of Commerce found that 75 percent of the respondents reported that a state's litigation environment is likely to affect important business decisions at their companies such as

where to locate or to do business. U.S. Chamber Institute for Legal Reform, *2015 Lawsuit Climate Survey: Ranking the States* (September 2015), p. 8, available at http://www.instituteforlegalreform.com/uploads/sites/1/Full_Report_Final_9.9.15.pdf (129 pages).

Moreover, it is not only large companies that need to make such decisions. A study conducted by Harris Interactive examined the effect of lawsuits on business decisions made by owners and managers of businesses with $10 million or less in annual revenues. Of the 1,109 respondents who were concerned about being the target of a frivolous or unfair lawsuit, 62 percent indicated that they make business decisions to avoid such lawsuits. U.S. Chamber Institute for Legal Reform, *Small Businesses: How the Threat of Lawsuits Impacts Their Operations* (May 10, 2007), p. 5, available at https://web.archive.org/web/20070721010704/http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1045 (32 pages).

Although due process requires a predictable connection between what a company does and where it may be sued for that conduct, an expansive standard for specific jurisdiction, like that applied by the California Supreme Court, eliminates or pervasively dilutes the required connection so that manufacturers cannot "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide*

*Volkswagen*, 444 U.S. at 297.[6] This unpredictability violates due process.

For example, manufacturers must make decisions about appropriately reserving for product-related liabilities through the purchase of insurance, or the establishment of financial reserves or other provisions for uninsured liabilities. They must also establish prices for their products that allow recoupment of associated costs as well as an appropriate return on investment. If a manufacturer knows that its product-related litigation will be distributed among the states roughly in proportion to sales, with perhaps a skewing to its home state to allow for general jurisdiction, it can establish and control insurance, reserves and pricing based on its own conduct. If, however, the locus of litigation is entirely unrelated to its conduct, and is instead essentially based on plaintiffs' counsel's unilateral predilections, the manufacturer can no longer order its conduct to limit where it may be sued for the conduct.[7] In the absence of predictability, the manufacturer may price too high or too low, leading to losses

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[6] The dissenting opinion below noted that the standard applied by the California Supreme Court "threatens to subject companies to the jurisdiction of California courts to an extent unpredictable from their business activities in California." *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 896 (2016) (Werdegar, J., dissenting).

[7] Indeed, the California court's reliance on uniform national advertising to subject a manufacturer to suit for conduct and injuries occurring elsewhere affords manufacturers in the internet era no practical way to "structure their primary conduct . . . [so as not to] render them liable to suit," *World-Wide Volkswagen*, 444 U.S. at 297, except to forebear from selling their products at all.

that will harm its employees and shareholders, and potentially even to product discontinuation, to the detriment of consumers – in the pharmaceutical context, patients – for whom the product would be beneficial.

Relatedly, the California court's untethered standard permits the aggregation in "magnet" jurisdictions of voluminous claims where the only meaningful connection with the forum is the claimants' decision to take advantage of its plaintiff-friendly courts. The present case is illustrative, as it aggregates the claims of 575 nonresident plaintiffs from 32 other states whose claims arose entirely outside California, as compared with only 86 in-state plaintiffs' claims.[8]

The harm caused by the California court's due process violation is only exacerbated by the extra costs incurred both in defending cases away from where the relevant events took place, and from the significantly heightened defense and liability costs inherent in a plaintiff-friendly forum.

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This Alice-in-Wonderland result cannot be what due process requires. See Section D infra.

[8] Many of these claims likely would not even have been filed but for the aggregated proceedings enabled by the California court's jurisdictional standard.

### C. The Standard Violates Due Process by Allowing States to Regulate Beyond the Proper Reach of Their Sovereign Power Under Our Federal System

Where, as here, a state court asserts jurisdiction over a nonresident defendant sued by hundreds of nonresident plaintiffs on claims arising entirely from the defendant's conduct outside the forum state, the court exceeds the boundaries of its authority under fundamental principles of federalism. Since a state lacks the authority to govern beyond the reach of its territorial power, restrictions on the personal jurisdiction of state courts "are more than a guarantee of immunity from inconvenient or distant litigation[,] . . . [t]hey are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

When an assertion of personal jurisdiction violates federalism principles, this overreaching also violates the nonresident defendant's liberty interests protected by the Due Process Clause.[9] The traditionally recognized limits on assertions of personal jurisdiction serve to "ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal

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[9] *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power [and] whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.").

system." *World-Wide Volkswagen*, 444 U.S. at 291-292.[10] Thus "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.* at 286.

Indeed, this Court has recognized that the constitutional limitations on a state court's jurisdiction are similar to the "limits on a State's power to enact substantive legislation." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982). In either case, "any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Id.* (internal quotations omitted).

In addressing due process limitations on punitive damages awards, this Court has also recognized the territorial limits on states' ability to regulate a nonresident defendants' conduct in other states. See e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) ("Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-572 (1996) (no State may "impose its own policy choice on neighboring States" and "a State may not impose economic sanctions on violators of its

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[10] See also *id.* at 293 ("The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States – a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.").

laws with the intent of changing the tortfeasors' lawful conduct in other States.").

"A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Campbell*, 538 U.S. *at* 422. Hence a state court exceeds its authority when it uses a civil case "as a platform to expose, and punish, the perceived deficiencies of [a defendant's] operations throughout the country." *Id.* at 420.

The aggregation of claims in plaintiff-friendly magnet jurisdictions, such as California, Missouri and Illinois, allows the courts in those states to regulate conduct occurring entirely in other states and involving citizens of other states. In effect, these magnet courts became national arbiters of claims involving whatever products plaintiffs choose to bring to their attention. "Nothing in *International Shoe* and its progeny suggests that 'a particular quantum of local activity' should give a State authority over a 'far larger quantum of . . . activity' having no connection to any in-state activity." *Daimler AG v. Bauman*, 134 S. Ct. 746, 762, n.20 (2014) (*quoting* Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. Rev. 694 (2012)).

The magnet courts' assertion of jurisdiction over claims based on conduct in other states exceeds the

forum state's territorial powers under our federal system, deprives the properly interested states of their power to govern conduct within their borders, and thus violates the nonresident defendant's due process rights.

### D. The Standard Would Subject Even Small Manufacturers to Burdensome Suits in Distant Jurisdictions

In finding that BMS's in-state conduct had a "substantial connection" to its out-of-state conduct that formed the basis of the nonresidents' claims, the California Supreme Court attached great significance to what it described as BMS's "nationwide marketing" of Plavix. *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 888 (2016).

The reality is that virtually all manufacturers today, both large and even of the "mom and pop" variety, advertise their products on the internet, typically through a company or product-specific website as well as through social media such as Facebook and Twitter. Since the internet is a medium that allows postings to be seen around the world, such advertising can readily be characterized as "nationwide marketing." See *Nicastro*, 564 U.S. at 890 (Breyer, J., and Alito, J., concurring) (noting that "a company targets the world by selling from its Web site"). Thus, when it comes to product-related claims, a standard like the one applied by the California court could dramatically expand the

reach of state courts' jurisdiction, making every manufacturer subject to suit for *all* sales of a particular product in every state where the manufacturer has sold *some* of that product.

It is no answer to say that a manufacturer can choose not to market on the internet. Internet advertising is so prevalent in today's marketplace, that many manufacturers of consumer goods would risk going out of business if they could not advertise on the internet. In exercising the liberty protected under the Due Process Clause, a company ought to have the freedom to stay in business while limiting the places where it will and will not be subject to suit.[11]

Several civil law countries, such as Belgium, Italy, Austria and Portugal, have enacted "retaliatory" jurisdictional provisions that empower their courts to exercise jurisdiction over foreign persons up to the extent that courts in the foreigner's home country can assert jurisdiction. See Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987). Thus, the California Supreme Court's expansive standard for specific jurisdiction could also

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[11] In another context, in *Mutual Pharm. Co. v. Bartlett*, this Court found that, since it was impossible for a manufacturer to comply with both federal regulations and inconsistent state regulations, the state regulations were preempted under the Supremacy Clause. 133 S. Ct. 2466, 2473 (2013). In so holding, the Court rejected the argument that plaintiff could comply with both the state and federal regulations by not selling the product at all. *Id.* at 2477-2478.

subject manufacturers, both large and small, to the unfair burdens of such reciprocal or retaliatory assertions of personal jurisdiction in foreign courts in connection with claims arising entirely out of conduct in the United States. See e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (finding that Nigerian nationals could not sue foreign companies in the United States for violations of the law of nations committed in Nigeria and noting that allowing such suits "would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world").

This Court should not find a personal jurisdiction standard that would permit or encourage such unfair burdens on defendants to be consistent with the Due Process Clause.

## CONCLUSION

For all of the foregoing reasons, PLAC urges the Court to overturn the ruling below and articulate a clear and predictable standard for specific jurisdiction,

which requires that a nonresident plaintiff's claims arise out of the nonresident defendant's activities in the forum state.

Respectfully submitted,

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## APPENDIX A

**Corporate Members of the Product Liability Advisory Council**
as of 2/6/2017

Total: 91

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3M

Altec, Inc.

Altria Client Services LLC

Astec Industries

Bayer Corporation

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

The Boeing Company

Bombardier Recreational Products, Inc.

Boston Scientific Corporation

Bridgestone Americas, Inc.

Bristol-Myers Squibb Company

C. R. Bard, Inc.

Caterpillar Inc.

CC Industries, Inc.

Celgene Corporation

Chevron Corporation

Cirrus Design Corporation

Continental Tire the Americas LLC

Cooper Tire & Rubber Company

Cordis Corporation

Crane Co.

Crown Equipment Corporation

Daimler Trucks North America LLC

Deere & Company

Delphi Automotive Systems

The Dow Chemical Company

E.I. duPont de Nemours and Company

Emerson Electric Co.

Exxon Mobil Corporation

FCA US LLC

Ford Motor Company

Fresenius Kabi USA, LLC

General Motors LLC

Georgia-Pacific LLC

GlaxoSmithKline

The Goodyear Tire & Rubber Company

Great Dane Limited Partnership

Hankook Tire America Corp.

Harley-Davidson Motor Company

The Home Depot

Honda North America, Inc.

Hyundai Motor America

Illinois Tool Works Inc.

Intuitive Surgical, Inc.

Isuzu North America Corporation

Jaguar Land Rover North America, LLC

Jarden Corporation

Johnson & Johnson

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Lincoln Electric Company

Magna International Inc.

Mazak Corporation

Mazda Motor of America, Inc.

Medtronic, Inc.

Merck & Co., Inc.

Meritor WABCO

Michelin North America, Inc.

Microsoft Corporation

Mitsubishi Motors North America, Inc.

Mueller Water Products

Novartis Pharmaceuticals Corporation

Novo Nordisk, Inc.

Pella Corporation

Pfizer Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

RJ Reynolds Tobacco Company

Robert Bosch LLC

The Sherwin-Williams Company

Sony Electronics Inc.

Stryker Corporation

Subaru of America, Inc.

Takeda Pharmaceuticals U.S.A., Inc.

TAMKO Building Products, Inc.

Teleflex Incorporated

Toyota Motor Sales, USA, Inc.

Trinity Industries, Inc.

U-Haul International

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Wal-Mart Stores, Inc.

Western Digital Corporation

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

ZF TRW

RECORD AND BRIEFS

No. 16-466

FILED
APR - 7 2017

In The

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The California Supreme Court**

## BRIEF OF PROFESSORS OF CIVIL PROCEDURE AND FEDERAL COURTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE *AMICI CURIAE*

This brief is written on behalf of a group of law professors who teach and write in the areas of Civil Procedure and Federal Courts. *See* Appendix (listing *amici curiae*). Our goal is to promote a coherent and workable approach to personal jurisdiction that is consistent with this Court's precedents and with the fundamental principles of due process.*

## SUMMARY OF ARGUMENT

The decision of the California Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court*, 1 Cal.5th 783 (2016), is fully consistent with the due process standards recognized by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), as well as with recent doctrinal developments applying and elaborating those standards. The state high court's "substantial connection" standard bridges the jurisdictional lacuna between specific and general jurisdiction and thus comports with "traditional notions of fair play and substantial justice." *Id.* at 316. In addition, that standard operates in a manner that is fully consistent

* Petitioner and Respondents have issued a general consent to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. Loyola Law School, Los Angeles, California, paid the cost of printing and filing this brief. No other person or entity made any monetary contribution to the preparation or submission of this brief.

with the practices and principles of the federal common law doctrine of pendent personal jurisdiction. We, therefore, urge this Court to affirm the decision of the California Supreme Court. To rule otherwise could have a significant and untoward effect on all forms of multistate and nationwide collective actions.

## ARGUMENT

### I. The California Supreme Court's Decision Comports with the Established Standards of Due Process

The suit filed against Bristol-Myers involves two sets of plaintiffs, those who are residents of California and those who are not. The resident plaintiffs' claims are centered on activity undertaken by Bristol-Myers in California. The courts of California clearly have personal jurisdiction over Bristol-Myers with respect to those claims, and no challenge has been made to the exercise of that jurisdiction. The claims of the non-resident plaintiffs, however, are the product of related activity undertaken by Bristol-Myers in states other than California. The question is whether the courts of California may exercise personal jurisdiction over Bristol-Myers with respect to those non-resident claims. The California Supreme Court answered that question in the affirmative. We agree.

## A.

The Due Process Clause requires fairness and reason in the exercise of government power. That demand finds its origin in Magna Carta's law-of-the-land principle, which was, in effect, a proscription against arbitrary government action.[1] In the context of personal jurisdiction, the core principles of due process are reflected in the judicial commitment to honor "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S., at 316 (1945) (*quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). A "notion" is a conception or an idea about something.[2] Thus, a traditional notion of fair play and substantial justice connotes deeply held conceptions of fairness and justice, and not simply an obeisance to past practices. In approaching due process, therefore, we should also be mindful of "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke. That tradition is a living thing." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

Consistent with the fair-play and substantial-justice standards, the *International Shoe* Court described a range of potential circumstances that would satisfy due process beyond the traditional categories: the commission of a single but substantively relevant act in the forum, the engagement in continuous and

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[1] Kerry v. Din, 135 S. Ct. 2128, 2132-33 (2015).

[2] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1545 (1993).

systematic activity in the forum giving rise to or related to the claim, and the engagement in continuous and systematic activity in the forum that was "so substantial" as to justify the exercise of jurisdiction over claims unrelated to that activity. From the foregoing description, we can see an inverse relationship between meaningful contacts and relatedness: as the contacts increase, the relatedness component relaxes, to the point of disappearing entirely once the contacts become "so substantial." The spectrum is fluid, and it is to be applied from a perspective of reasonableness that is dependent on the specific circumstances of the case.

The modern law of personal jurisdiction has reduced *International Shoe*'s fluid spectrum to a mechanical, bright-line distinction between "specific" jurisdiction, which embraces the first two *International Shoe* categories, and "general" jurisdiction, which embraces the third. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (describing specific jurisdiction as embracing two separate scenarios: single-act and continuous-and-systematic); *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (same). Both specific jurisdiction and general jurisdiction require that the non-resident defendant have engaged in purposeful activity in or directed toward the forum state. Specific jurisdiction also imposes a relatedness requirement that is often (but not exclusively) described as being premised on some type of causal link between the purposeful contacts and the claim, ranging from a but-for to a proximate-cause standard, though the

phrase "related to" would seem to suggest a less rigid formula.[3] General jurisdiction imposes no such relatedness requirement. In determining whether general

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[3] Despite the Petitioner's insistence to the contrary, this Court has yet to define the scope of the relatedness requirement and has certainly not endorsed any specific causation standard. Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) ("arises out of *or relates to*") (emphasis supplied); *cf.* Brief for the Petitioner, at 17-22 (insisting that this Court has adopted a proximate cause standard). In essence, the Petitioner consistently makes the error of assuming that the sufficient establishes the necessary and fails to see the apparent distinction between "arises out of" and "relates to." Lower federal courts have recognized the lack of instruction from the Court and have recognized a range of relatedness possibilities that operate within a causative chain between the contacts and the claim. That range begins with a minimal cause-in-fact requirement – a but-for test – and extends to a more rigorous legal-cause requirement – proximate cause or substantive relevance. *See, e.g.*, Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements, Ltd., 328 F.3d 1122, 1131-32 (9th Cir. 2003) (endorsing but-for standard); Beydoun v. Wataniya Restaurants Holding, Q.S.C., 768 F.3d 499, 506-08 (6th Cir. 2014) (endorsing a proximate-cause standard). Between these endpoints is a middle-ground standard, in which the contacts satisfy the but-for standard but are not substantively relevant to the claim. As to this middle ground, the due-process adequacy of the contacts depends on whether those contacts render suit in the forum fair or reasonable. The measure is sometimes stated in terms of foreseeability of suit in the forum and sometimes as a product of the reciprocal benefits and burdens of doing business there. *See, e.g.*, O'Connor v. Sandy Lane Hotel Co., Ltd., 496 F.3d 312, 321-24 (3d Cir. 2007) (endorsing middle-ground approach premised on reciprocal benefits and burdens); Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 716 (1st Cir. 1996) (endorsing a middle-ground approach based on foreseeability of suit in the forum), *cert. denied*, 520 U.S. 1155 (1997). State courts, on the other hand, have sometimes found relatedness outside of the causal chain. *See, e.g.*, Al Rushaid v. Pictet & Cie, 68 N.E.3d 1, 11 (2016) (a "relatively permissive"

jurisdiction may be exercised, this Court has reduced *International Shoe*'s "so substantial" standard to a very strict "at home" metaphor that mirrors the traditional domicile basis of jurisdiction. *Daimler AG v. Bauman*, 134 S. Ct. at 751. The at-home standard has made it extraordinarily difficult to establish general jurisdiction, even where considerations of fairness and efficiency would overwhelmingly support its exercise.

The consequence of these doctrinal developments, including an apparent preference for some form of causation, has been to create a jurisdictional lacuna between specific and general jurisdiction where the purposeful contacts may be truly substantial but nonetheless inadequate to satisfy either standard, due either to a lack of a causal relatedness or to a failure to satisfy the at-home metaphor. But, as we explain below, denying jurisdiction under such circumstances would be to stamp as unconstitutional a practice that readily comports with fair play and substantial justice as so recognized by this Court in *International Shoe*.[4]

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standard that "does not require causation" in context of state long-arm statute).

[4] The lacuna can be seen as a product of treating both aspects of specific jurisdiction – single-act and continuous-and-systematic – as raising identical due process concerns. That approach, however, fails to account for the context-specific principle of due process. Nor is it consistent with the oft-used phrase, "arise out of or relate to," Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985), *quoting* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984), which appears to recognize a broader spectrum of relatedness that ranges beyond causation.

**B.**

Petitioner is correct that no activity undertaken by Bristol-Myers in California falls within the causative chain of the claims asserted by the non-resident plaintiffs. Indeed, the California Supreme Court disclaimed any reliance on even a minimal cause-in-fact requirement in upholding the exercise of personal jurisdiction.[5] That disclaimer may place the state high court's version of relatedness somewhat outside the mainstream, yet it is quite consistent with the linguistic distinction between "arises out of" (a causal link) and "related to" (a non-causative link). It is also clear that although Bristol-Myers has substantial purposeful contacts with the State of California, the company is not "at home" there under current standards. Hence, under a mechanical, hornbook approach to minimum contacts, the assertion of jurisdiction over Bristol-Myers may seem unusual or even questionable.

However, the rigid approach endorsed by the Petitioner is neither required by precedent nor readily inferred from principle. Rather, we think jurisdiction over the non-resident claims against Bristol-Myers ought to be – and easily can be – sustained under the core due process principles of fairness and reason. While the constructed and constricted categories of specific and general jurisdiction may be useful tools in conventional cases, they are not substitutes for the principles they were meant to serve. And the notion

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[5] *Bristol-Myers*, 1 Cal.5th, at 650.

that there should be a jurisdictional lacuna in the *International Shoe* spectrum runs against the grain of a flexible, fluid, and sensible law of due process. To value the doctrinal categories over the foundational principles on which they rest is to elevate an arid formalism over a realistic appraisal of the facts, while at the same time demeaning the pragmatic balancing of interests required by the due process of law. Where, as here, the Petitioner's activities are "continuous and systematic," the relationship requirement must be understood as serving the conception of "fair play and substantial justice," rather than as imposing an artificial "causation" barrier to the efficient resolution of controversies that implicate significant state interests.

## C.

The California Supreme Court based its finding of relatedness on the non-causal, factual relationship between the claims asserted by the resident plaintiffs and those asserted by the non-resident plaintiffs. Both sets of claims involved essentially identical allegations of the manufacture of a dangerous and defective drug – Plavix – and a unified nationwide marketing and distribution scheme targeting consumers – television, magazine, and internet advertising – that falsely and fraudulently promoted the sale of that drug.[6] There was no suggestion that either the drug or the marketing plan varied from state to state. Hence, the only difference between the claims of the resident plaintiffs

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[6] *Id.* at 652-53.

and those of the non-resident plaintiffs was the location of the sale and use of the drug. In short, both sets of claims arose from the common core of the defendant's manufacture of Plavix and the nationwide marketing and distribution scheme used to promote its sale. That commonality was sufficient, in the California Supreme Court's estimation, to establish a "substantial connection" between Bristol-Myers' purposeful marketing and sales activities in the state (giving rise to the resident claims) and the virtually identical claims asserted against Bristol-Myers by the non-resident plaintiffs.

Once it determined that the non-resident plaintiffs satisfied the contacts and relatedness requirements of the minimum contacts test, the California Supreme Court turned to the question of reasonableness. The state high court examined reasonableness from the perspective of the defendant, the plaintiffs, the forum state, and the interstate judicial system's interest in obtaining an efficient resolution of the case.[7] It prefaced this discussion by noting that Bristol-Myers did not contend that the exercise of jurisdiction over it in California would be "fundamentally unfair."[8] It then discussed and balanced each of the four relevant interests and concluded that Bristol-Myers had "failed to carry its burden of showing that the exercise

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[7] *Id.* at 656-60.

[8] *Id.* at 656.

of personal jurisdiction over it in this matter is unreasonable."[9]

In seeking review in this court, Bristol-Myers couched the question presented as:

> Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims – that is, where the plaintiff's claims would be exactly the same even if the defendant *had no forum contacts*.

Petition for Certiorari, at (i) (emphasis supplied). The last clause of this statement ignores the critical fact that the defendant here had *substantial forum contacts*, contacts that concededly gave rise to the virtually identical claims of the resident plaintiffs. Thus, in our view, the true question before this Court is whether, under the circumstances presented here, the exercise of jurisdiction over Bristol-Myers with respect to the *additional* – but essentially identical – claims of the non-resident plaintiffs is fair, just, and reasonable. Essentially, Petitioner asks this Court to fit the *Bristol-Myers* case to a narrow doctrinal category, rather than try to fit the principle to the case, as justice would instead demand.[10]

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[9] *Id.* at 660.

[10] Roscoe Pound, *Courts and Legislation*, 7 Am. Pol. Sci. Rev. 361, 365 (1913).

**D.**

For two reasons, we believe the California Supreme Court's decision was correct as a matter of due process. First, given Bristol-Myers' significant and purposeful contacts with California, the state high court's substantial-connection rationale comports with *International Shoe*'s fluid spectrum of jurisdiction in which the requirement of relatedness varies in intensity with the quality and quantity of the contacts. Specifically, the endorsement of non-causal relatedness when the non-resident's contacts are continuous, systematic and substantial fills the jurisdictional lacuna between cause-bound specific jurisdiction and at-home general jurisdiction. Instead of dissolving jurisdiction into an empty space, as is true of the cause-bound standard, the substantial connection standard permits a form of relatedness that moves seamlessly from specific to general jurisdiction. In short, unlike Petitioner, we think the line between specific and general jurisdiction should be blurred instead of artificially constricted. *See* Brief of Petitioner, at 32-37.

Second, the doctrine of supplemental jurisdiction provides an instructive perspective from which to assess the California Supreme Court's application of the relatedness standard. As is evident, the California Supreme Court's approach to relatedness operates much like the federal doctrine of supplemental jurisdiction. Under that doctrine, a federal court may exercise subject matter jurisdiction over an entire case, including claims over which there is no independent basis of subject matter jurisdiction, so long as that claim arises out

of a "common nucleus of operative facts" with a claim over which there is an independent basis of jurisdiction.[11]

The ultimate determination of supplemental jurisdiction includes both a fact-based and efficiency-driven component of power and a reason-based component of discretion,[12] which is to say that the law of supplemental jurisdiction is a product of fairness and efficiency tempered by reasonableness. More generally, the doctrine is built on a common sense accommodation of litigational convenience and jurisdictional principle that strikes a due process balance among the relevant interests at stake. Thus although supplemental jurisdiction is not technically a doctrine of due process, it is in fact consistent with and conducive to due process.

The flexible model of supplemental jurisdiction translates nicely into the question here presented. The courts of California undoubtedly have jurisdiction over the claims of the resident plaintiffs, and it is equally clear that the claims of the resident and non-resident plaintiffs arise out of a common nucleus of operative facts – the manufacture and nationwide marketing scheme for the drug Plavix. In addition, the consolidated litigation of the resident and non-resident claims will unquestionably promote judicial economy and litigational convenience. Furthermore, as noted, the California Supreme Court carefully surveyed the question

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[11] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[12] 28 U.S.C. §§ 1367(a) & (c).

of reasonableness from all relevant perspectives and concluded that Bristol-Myers, in addition to having made no claim of fundamental unfairness, failed to show that the exercise of jurisdiction over the non-resident claims would be unreasonable. Petitioner has raised no challenge to those findings. In short, the California Supreme Court's analysis was a product of fairness, efficiency, and reasonableness.

The applicability of supplemental-jurisdiction-type principles to the law of personal jurisdiction is now recognized in the emerging common law doctrine of "pendent personal jurisdiction."[13] That doctrine vests federal district courts with the power to exercise personal jurisdiction over a non-resident defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as that claim "arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction." *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004). The policy behind this doctrine is expressly premised on due process concerns. As the Ninth Circuit explained in *Action Embroidery*, "We believe that judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties is best served by adopting this doctrine." *Id.* at 1181. In accord with

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[13] For a lucid discussion of pendent personal jurisdiction and its essential role in the modern law of jurisdiction, see Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C.D. L. Rev. 207, 243-52 (2014).

those principles and much like supplemental jurisdiction, a court may likewise decline to exercise pendent personal jurisdiction "where 'considerations of judicial economy, convenience and fairness to litigants' so dictate." *Oetiker v. Werke*, 556 F.2d 1, 5 (D.C. Cir. 1977) (citing *United Mine Workers v. Gibbs*, 383 U.S. at 726). Every circuit that has expressly considered the doctrine of pendent personal jurisdiction has endorsed it.[14]

As noted, pendent personal jurisdiction is technically a federal common law doctrine. Yet the due process principles on which it rests – judicial economy, convenience, and fairness – are fully applicable to a state court's exercise of personal jurisdiction. While the California Supreme Court did not purport to apply the doctrine of pendent personal jurisdiction, that court's approach to relatedness and its overall reasoning – as described above – bears a striking resemblance in both theory and practice. As such, the decision is consistent with and conducive to due process. The critical point here is not that this Court should now endorse pendent personal jurisdiction, but

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[14] *See, e.g.*, Avocent Huntsville Corp. v. Aten Intern. Co., Ltd., 552 F.3d 1324, 1339-40 (Fed. Cir. 2008), *cert. denied*, 557 U.S. 904 (2009); Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F.3d at 1180-81 (9th Cir. 2004); United States v. Botefuhr, 309 F.3d 1263, 1272-75 (10th Cir. 2002); Robinson Engineering Co., Ltd. Pension Plan & Trust v. George, 223 F.3d 445, 449-50 (7th Cir. 2000); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 628-29 (4th Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056-57 (2d Cir. 1993), *cert. denied*, 513 U.S. 822 (1994); Oetiker v. Werke, 556 F.2d at 5 (D.C. Cir. 1977); Robinson v. Penn Cent. Co., 484 F.2d 553, 555-56 (3d Cir. 1973).

that the California Supreme Court's application of relatedness is fully consistent with the due process principles reflected in the recognized parallel doctrine of pendent personal jurisdiction.

## E.

The principles of fairness and reasonableness at the heart of due process require, in the context of the minimum contacts test, a showing that the nonresident defendant has engaged in purposeful activity directed at the forum state. The substantial activities of Bristol-Myers in California surely satisfy that standard. Such purposefulness is the necessary first step in assuring that a state will not exercise its judicial power in an arbitrary manner, *i.e.*, in a manner that extends beyond its sovereign prerogative. The doctrinal categories of specific and general jurisdiction, both of which depend on this premise of purposeful contacts, help map out the circumstances where the exercise of that power will presumptively comport with "traditional notions of fair play and substantial justice." But those doctrines are simply shorthand tools for advancing the underlying principles. The California Supreme Court's approach to relatedness bridges the gap between the doctrinally rigid categories of specific and general jurisdiction and, in so doing, honors the fluid concept of due process as applied in the context of personal jurisdiction. Whether one reads the state high court's decision as extending relatedness into the jurisdictional lacuna between specific and general jurisdiction or as implicitly reflecting the doctrine of pendent

personal jurisdiction, there is no doubt that the California court's decision comports with the due process standards of fairness, reasonableness, and a balanced approach to the competing interests at stake.

## II. A Decision Reversing the California Supreme Court Would Substantially Curtail Nationwide and Multi-State Class Actions

Endorsement of Petitioner's call for an exclusive proximate cause standard of relatedness will have repercussions well beyond the contours of the immediate case. In the specific context of multi-state and nationwide class actions, the consequences might be dramatic. Except in those cases in which the claims of the named plaintiffs and the claims of every class member arose in the same state (in the sense of causal relatedness), the only available forum would be in the defendant's home state, regardless of whether considerations of fairness, justice, and more generally, reason, would demand otherwise. Petitioner's mechanical approach to jurisdiction would, therefore, frustrate the class action joinder device under Federal Rule of Civil Procedure 23 and prevent it from operating as intended. Thus, the inefficiencies that will occur in this case should this Court reverse – separate cases filed in state and federal courts in a multitude of states – will spread throughout the interstate system of justice. These potential consequences must be taken into

account in the Court's consideration of the formulaic approach to due process endorsed by the Petitioner.

## CONCLUSION

We urge this Court to affirm the decision of the California Supreme Court as consistent with the principles underlying this Court's jurisprudence of personal jurisdiction and with the doctrine of pendent personal jurisdiction.

Date: April 7, 2017

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR - 7 2017
OFFICE OF THE CLERK

No. 16-466

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO *et al.*,
*Respondents.*

On Writ of Certiorari
to the California Supreme Court

## BRIEF FOR PUBLIC JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE *AMICUS*[1]

Public Justice, P.C. ("Public Justice") is a national public interest law firm that pursues high impact litigation to enhance the public's access to justice. Public Justice routinely advocates in courts across the nation, including the Supreme Court of the United States, by filing *amicus curiae* briefs in cases involving issues of vital public concern.

The issues presented in this case are of substantial importance to the public interest throughout the United States. In this case and many others across the country, corporations are attempting to limit injured plaintiffs' access to justice by advocating such a narrow reading of this Court's personal jurisdiction precedent as to effectively deny injury victims access to state courts.

Public Justice submits this brief to assist the Court in understanding why the ruling of the California Supreme Court affirming specific personal jurisdiction over Petitioner Bristol-Myers Squibb Company (hereinafter "BMS") comports with traditional notions of fair play and substantial

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[1] Both Petitioner and Respondents have submitted letters to the Court granting blanket consent to the filing of *amicus curiae* briefs in support of either or neither party. No counsel for either party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief; no person other than Public Justice, P.C., its members, or its counsel made such a monetary contribution.

justice and thus with this Court's personal jurisdiction jurisprudence.

## SUMMARY OF ARGUMENT

This Court's canonical decision expanding the scope of personal jurisdiction in state court over out-of-state corporate defendants, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), announced the core principle for constitutional assertions of personal jurisdiction: "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend '*traditional notions of fair play and substantial justice.*'" *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (emphasis added). So long as the legal obligations at issue in a case "arise out of or are connected with" the corporation's activities within the state, the court's exercise of personal jurisdiction over the defendant can "hardly be said to be undue." *Id.* at 319.

Here, BMS argues that unless a defendant is sued "at home," where it is either incorporated or has its principal place of business, *see Daimler A.G. v. Bauman*, 134 S. Ct. 746, 760-61 (2014), personal jurisdiction *only* exists when the plaintiff's injury was proximately caused by a non-resident defendant's contacts in a forum.

Under this extreme approach, a court is prohibited from exercising jurisdiction over a non-resident defendant on a "non-proximate" cause of action, no matter how extensive the defendant's

contacts with the forum state; how related the cause of action to the defendant's activities in the state; how many benefits the defendant has gleaned from its business in the forum; and regardless of whether the defendant may already be "haled" into the forum court on identical claims.

BMS's approach, *amicus* submits, would dramatically alter existing jurisprudence, makes no sense in today's world of national commerce, and does not comport with long-standing notions of due process.

As this Court recognized long ago in *International Shoe*, at their core, questions of personal jurisdiction boil down to a question of fundamental fairness: does the exercise of jurisdiction over a defendant comport with "traditional notions of fair play and substantial justice"? 326 U.S. at 316. In a case in which, as here, the plaintiffs' claims do not directly arise out of the defendants' forum contacts yet are directly related to activities that the defendant has purposely directed at the forum, it makes no sense to cut the jurisdiction inquiry off at its roots.

Instead, in keeping with *International Shoe*'s focus on fundamental fairness, a focus grounded in due process, a court should consider "whether the defendant's contacts with the state were deliberate, whether the defendant was seeking economic benefit from a forum market, and whether the defendant might reasonably have anticipated suit in the state by reason of its claim-related activities." Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 663 (1988).

Under this formulation, there is no sound basis to argue that the exercise of jurisdiction over BMS in this case offends due process. BMS's contacts with California were ongoing, systematic, and deliberate; it was seeking an economic benefit in California, to the tune of nearly $1 *billion* in Plavix sales, alone, from 2006-2012, Pet'r's Pet. 5; and it is being sued by both California and non-California plaintiffs, together, for injuries suffered as a result of BMS's uniform, national marketing practices that caused harm both in California and elsewhere. Given this fact pattern, which is nothing like the conduct alleged in cases like *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. 915, 919-921 (2011), and *Daimler*, 134 S. Ct. at 760-61, the notion that it would be "unfair" for BMS to be "haled" into a California court on respondents' claims is almost laughable.

This conclusion is underscored by the fact that this Court has, on at least two prior occasions, rejected due process challenges to a court's exercise of personal jurisdiction over the claims of out-of-state plaintiffs against out-of-state defendants. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797 (1985). In *Keeton*, this Court held that New Hampshire could exercise specific jurisdiction over *Hustler Magazine* in a libel action arising out of a nationwide publication, even though neither the plaintiff nor the defendant resided in the forum state and most of the plaintiff's injuries occurred elsewhere. 465 U.S. at 780. And in *Shutts*, the Court allowed a nationwide class action to proceed against a non-resident oil company defendant in state court, despite the fact that only a tiny percentage of the alleged injuries arose out of

the defendant's activities in the forum. 472 U.S. at 799-801. The situation in this case is analogous: as in *Keeton*, respondents' claims all relate directly to a common, nationwide course of conduct on BMS's part; and, as in *Shutts*, there is no basis for arguing that BMS lacks the requisite contacts with the forum state such that allowing the litigation to proceed would offend "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316.

Another helpful analogy can be drawn from federal multi-district litigation (MDL) proceedings under 28 U.S.C. § 1407, which this Court has endorsed often. Ironically, given how often it waves the "federalism" flag in defense of its position, BMS points to this procedure as a preferred, more "efficient" alternative to the California Supreme Court's approach. *See* Pet'r's Br. 50-51. But this argument proves too much, for if federal MDLs do not offend due process, then neither does the lower court's ruling—and, of course, vice versa, as respondent explains. *See* Resps.' Br. 38-46 (arguing petitioner's novel causation requirement would disrespect federalism and "render unconstitutional . . . the entire federal [MDL] scheme").

BMS's arguments also ignore that numerous procedural safeguards exist to protect the interests of defendants in multi-plaintiff, multi-state litigation, including choice-of-law rules and *forum non conveniens* motions. Many of these doctrines would make little sense if state courts could not exercise personal jurisdiction over defendants in these circumstances. And such doctrines provide important protections to ensure that the exercise of jurisdiction in such cases will not offend substantial

justice and fair play. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

BMS's "federalism" argument also is belied by this Court's recognition that "State courts routinely exercise subject-matter jurisdiction over civil cases arising from events in other States and governed by the other States' laws." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 481 (1981). Beyond that, this Court has rejected unequivocally the idea that the "federalism concept operate[s] as an independent restriction on the sovereign power of a court." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

Finally, it is important to remember that state courts have long overseen multistate mass tort and class actions in a wide range of areas; have great expertise in applying state tort laws; and conduct multidistrict litigation quickly and more efficiently than their federal counterparts. Thus, the result that BMS seeks in the name of "efficiency" would deprive many plaintiffs of the fairest and most expeditious forum for resolution of their claims. For many mass tort plaintiffs facing life-threating injuries, the delays encountered in cumbersome federal MDLs can effectively cut-off their access to any meaningful relief.

For all of these reasons, this Court should affirm the ruling of the California Supreme Court and remand this case for further proceedings.

## ARGUMENT

### I. THE EXERCISE OF PERSONAL JURISDICTION OVER BMS SATISFIES DUE PROCESS.

#### A. Specific Jurisdiction Should Be Analyzed as an Application of *International Shoe's* Requirement of "Fair Play and Substantial Justice."

Since *International Shoe*, this Court has had numerous opportunities to flesh out the boundaries of specific personal jurisdiction. In virtually every case, the Court has explained that the test for finding specific jurisdiction over an out-of-state defendant is an application of the "fair play and substantial justice" standard articulated in *International Shoe*. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Keeton*, 465 U.S. at 780-81; *Burger King*, 471 U.S. at 464; *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011); *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

Moreover, the Court has made clear that, when a defendant has purposefully availed itself of the forum by directing its activities into the state, the requirements for finding jurisdiction are not onerous:

> where the defendant "deliberately" has engaged in significant activities within a State, . . . he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to

> require him to submit to the burdens of litigation in that forum as well.

*Burger King*, 471 U.S. at 475-76 (quoting *Keeton*, 465 U.S. at 781).[2]

Each of the three main elements of the test this Court has developed for specific personal jurisdiction reflects this core due process focus on "fair play and substantial justice" and should be understood as an application of that constitutional standard. The requirement that a defendant must have "purposefully directed" its activities at the forum state, *Keeton*, 465 U.S. at 774, puts the defendant on "clear notice that it is subject to suit there," *World-Wide Volkswagen*, 444 U.S. at 297. The requirement that the litigation must result from "alleged injuries that 'arise out of or relate to' those activities," *Burger King*, 471 U.S. at 472 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)), provides "fair warning" about the nature of the litigation to which a potential defendant may be exposed, so that it may take steps to alleviate or insure against that risk. *Id.* Finally, "[o]nce it has been decided that a defendant has purposefully established minimum contacts within the forum State," the requirement that a court consider those contacts "in light of other factors" that bear on the

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[2] This conclusion reflects this Court's understanding that, "because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." *Id.* at 474 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

reasonableness of an "assertion of personal jurisdiction," *id.* at 476, provides necessary flexibility to ensure that too rigid an application of the minimum contacts analysis not undermine the due process concern of fair play and substantial justice.[3]

### B. The Exercise of Jurisdiction Over BMS Comports with "Traditional Notions of 'Fair Play and Substantial Justice.'"

As the California Supreme Court correctly recognized, all three requirements, and thus fair play and substantial justice, are satisfied here. Pet'r's App. at 24a, 32a, 44a.[4] BMS purposefully directed its uniform, national marketing campaign for Plavix into California, resulting in hundreds of millions of dollars of sales of the drug in the state. Pet'r's App. at 5a, 28a. Thus, BMS's "conduct and connection with [California] are such that [it] should reasonably anticipate being haled into court there, . . . the foreseeability that is critical to due process analysis."

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[3] It should be noted that, under this Court's precedents, these "other factors" are generally intended to expand, not narrow, the scope of personal jurisdiction, i.e., "to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477. By contrast, "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional." *Id.*

[4] Indeed, as the California Supreme Court noted, Pet'r's App. at 21a n.2, BMS did not even contest that the first and third requirements were met.

*World-Wide Volkswagen*, 444 U.S. at 297. Indeed, BMS has never disputed that the California courts may exercise personal jurisdiction over it for the Plavix claims brought by California residents.

There also can be no dispute that the claims at issue are "related to" and "connected with" BMS's activities in California.[5] BMS engaged in a uniform, national marketing program for Plavix in all fifty states, with a common design and identical, FDA-approved labeling. And its drug caused similar injuries to plaintiffs across the country. Thus, all of the claims, by both California and non-California plaintiffs will require virtually identical discovery from BMS and also raise common issues of fact and law. Indeed, it is precisely because of the close relationship between all of these claims that the plaintiffs were able to join in multi-plaintiff lawsuits

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[5] Again, *Amicus* does not understand BMS to dispute this proposition. The company simply disputes whether claims "related to" or "connected with" a defendant's forum activities, as opposed to claims proximately caused by those activities, are sufficient to trigger specific jurisdiction. Pet'r's Br. 37. Yet, in every single case from *International Shoe* forward in which this Court has discussed case-specific jurisdiction, it invariably has included broader language encompassing claims "related to" or "connected with" the defendant's activities in the forum. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 319 ("connected with"); *Goodyear*, 564 U.S. at 919 (same); *Helicopteros Nacionales*, 466 U.S. at 414 n.8 (1984) ("related to"); *Burger King*, 471 U.S. at 472 (same); *Nicastro*, 564 U.S. at 881 (both); *cf.* Twitchell, *supra*, at 655-56 ("Although requiring that the defendant have some purposeful contact with the forum and that the claim be connected to that contact significantly increases the chances that the forum will be fair, a particular degree of claim-relatedness is not a constitutional requirement for specific jurisdiction.").

under California joinder rules and that those suits were then approved for coordination under California's Judicial Council Coordinated Proceeding (JCCP) procedures. Cal. Code Civ. P. § 404.1 ("Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes . . . will promote the ends of justice . . . .").

Finally, each of the other factors identified in *World-Wide Volkswagen*, 444 U.S. at 292, and reiterated in *Burger King*, 471 U.S. at 476-78, supports the conclusion that the California courts' exercise of jurisdiction here is consistent with "'traditional notions of fair play and substantial justice.'" The burden on BMS to litigate the claims of out-of-state plaintiffs in California is minimal, especially given that it concedes that it must defend the identical claims brought by California plaintiffs in this action. Indeed, it would likely be far more burdensome to have to litigate separate actions in each state in which one or more plaintiffs resides.

Likewise, California has an "interest in adjudicating the dispute," *id.* at 477, given the close connection between the out-of-state and in-state plaintiffs' claims, the state's interest in regulating BMS's marketing of Plavix because so many state residents use the drug, and the judicial economies and efficiencies that may be achieved by adjudicating the claims together. For precisely the same reason, such joint litigation in California serves both "'the plaintiffs' interest in obtaining convenient and effective relief'" and also "'the interstate judicial system's interest in obtaining the most efficient

resolution of controversies.'" *Id.*[6] Finally, because every state permits product liability actions to protect their citizens from unreasonably dangerous products and the companies that negligently market them, this litigation involving plaintiffs from multiple states advances the "'shared interest of the several States in furthering fundamental substantive social policies.'" *Id.* at 477.

Thus, each of the requirements articulated by this Court for specific personal jurisdiction are satisfied here. BMS has purposefully directed its marketing of Plavix into California; the claims at issue are "related to" and "connected with" those marketing activities; and the "other factors" identified in this Court's precedents support the exercise of jurisdiction. Because each of these requirements derives directly from the core due process principles articulated in *International Shoe*, there can be no doubt that California's assertion of personal jurisdiction over BMS in this case comports with "fair play and substantial justice."

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[6] *Amicus* does not mean to suggest that joint litigation in California would be superior to comparable joint litigation in any other state in which BMS has "purposefully established minimum contacts," *id.* at 476, but rather that such joint, multi-state litigation in any state with jurisdiction over BMS serves these purposes and thus renders the exercise of jurisdiction reasonable.

### C. BMS Has Not Shown That California's Exercise of Personal Jurisdiction Is In Any Way Unfair or Unjust

BMS's contrary argument attempts to narrowly construe the meaning of the phrase "arise out of or relate to" as a matter of semantics, without any consideration of the relationship between the test it proposes and the Due Process Clause's concern with fair play and substantial justice. Pet'r's Br. 14-32. BMS concedes that its marketing of Plavix in California was sufficient to put it on notice that it might be haled into court there to answer for injuries caused by its drug and admits that there is nothing unreasonable or unduly burdensome about its being compelled to litigate in that forum. It nevertheless argues that it is not subject to personal jurisdiction in California for the claims of non-California plaintiffs simply because those plaintiffs do not reside in California and BMS's activities in that state were not the proximate cause of their injuries. But this Court has previously expressly held that "plaintiff's residence in the forum State is not a separate requirement [for personal jurisdiction], and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Keeton*, 465 U.S. at 780; *see also id.* at 779 ("[W]e have not . . . required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant.").

Just as important, BMS's argument ignores the critical question of fairness that is the touchstone of due process analysis. BMS offers this Court no

reason whatsoever to believe that the California courts' exercise of jurisdiction in this case would be in any way unfair or unjust to Petitioner. As this Court held more than seventy years ago in *International Shoe*, "due process requires *only*" that a court's exercise of personal jurisdiction over a defendant "not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316 (emphasis added). Absent such a showing, there is simply no basis on which to find a due process violation.

## II. THE EXERCISE OF PERSONAL JURISDICTION OVER BMS IS CONSISTENT WITH BOTH THIS COURT'S PRECEDENTS AND WITH LONGSTANDING RULES FOR JOINT, MULTI-STATE LITIGATION.

The lower court's holding also is fully in keeping with this Court's prior precedent and with the federal practice of consolidating large numbers of state cases in federal multi-district proceedings. This Court, on at least two prior occasions, has rejected due process challenges to a court's exercise of personal jurisdiction over the claims of out-of-state plaintiffs against out-of-state defendants. *See Keeton*, 465 U.S. 770; *Shutts*, 472 U.S. 797. The Court also has indicated its approval of similar federal MDL proceedings under 28 U.S.C. § 1407, albeit without directly addressing that statute's constitutionality. These precedents strongly support the exercise of jurisdiction over BMS here.

*Keeton* involved a libel action brought by a New York resident against Hustler Magazine, an Ohio corporation, in the United States District Court for

the District of New Hampshire.[7] Petitioner Keeton sought to recover in that court for libel damages she had suffered in all fifty states. This Court ruled that Hustler's sale of 10,000 to 15,000 copies of its magazine in New Hampshire each month constituted sufficient minimum contacts to support personal jurisdiction over a libel claim based on the magazine's contacts, even for the claims for libel damages in other states. 465 U.S. at 773-74.

The Court reasoned that Hustler's purposeful conduct in circulating copies of its magazine in New Hampshire "unquestionabl[y]" satisfied *International Shoe*'s "minimum contacts" requirement for a complaint based on those contacts. *Id.* at 774. While it was "relevant to the jurisdictional inquiry" that Keeton was seeking damages for libel in all fifty states, this Court concluded that New Hampshire's interest in adjudicating the dispute was sufficient. *Id.* at 775-76. It was "beyond dispute that New Hampshire ha[d] a significant interest in redressing injuries that actually occur[ed] within the State." *Id.* at 776. But the state also had "a substantial interest in cooperating with other States . . . to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding." *Id.* at 777. Such a unitary proceeding "reduces the potential serious drain of libel cases on judicial resources" and "also serves to protect defendants

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[7] Just as in state court, personal jurisdiction in federal district court was determined by application of the New Hampshire long-arm statute, which had been construed to "authoriz[e] service of process on nonresident corporations whenever permitted by the Due Process clause." 465 U.S. at 774.

from harassment resulting from multiple suits." *Id.* The combination of these two interests made it appropriate to require Hustler "to answer to a multistate libel action" in the state. *Id.* at 777-78. As the Court concluded: "Respondent produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed." *Id.* at 781.

The situation before this Court is closely analagous. BMS is a national corporation that regularly and continuously markets a drug, Plavix, through a uniform national marketing plan, aimed at consumers across the country. That drug has caused comparable injuries to users in virtually every state. BMS's purposeful conduct in advertising, marketing, and selling Plavix in California unquestionably satisfies the minimum contacts requirement for claims related to those contacts. California has both a strong interest in adjudicating claims for injuries caused by Plavix in that state and also a substantial interest in providing a forum for efficiently litigating all issues and damage claims arising out of BMS's uniform national marketing campaign. To paraphrase *Keeton*, there is no unfairness in calling BMS to answer for the injuries caused by the marketing of its drug wherever a substantial number of Plavix prescriptions are written and filled.[8]

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[8] BMS will no doubt attempt to distinguish *Keeton* by emphasizing the fact that it was the same plaintiff suing for libel damages in all fifty states, not multiple plaintiffs. But this Court addressed that concern in *Keeton* by noting that it is not a requirement of due process that a plaintiff have minimum

*Shutts* presented similar jurisdictional considerations in the context of a nationwide class action in Kansas state court. The case involved a dispute over delayed royalty payments for natural gas leases. Phillips Petroleum, a Delaware corporation with its principal place of business in Oklahoma, had negotiated leases to extract natural gas from land in eleven different states. Less than one percent of the leases were on Kansas land. The named plaintiffs in the lawsuit were citizens of Kansas and Oklahoma and owned gas leases in Oklahoma and Texas. They nevertheless filed a nationwide class action against Phillips challenging the delayed royalty payments in Kansas state court. Leaseholder class members came from all fifty states. 472 U.S. at 799-801.

Phillips challenged personal jurisdiction—not on its own behalf, but on behalf of absent plaintiff class members who lacked minimum contacts with Kansas! *Id.* at 802. Phillips made no argument whatsoever that the Kansas court lacked personal jurisdiction over it as a corporate defendant to adjudicate the issue of royalty payments on the 99+% of the leases that were not on Kansas land.

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contacts with the forum state in order for that state "to assert personal jurisdiction over a nonresident defendant." *Id.* at 779. "[R]espondent is carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire." *Id.* at 780. BMS carries on part of its general business of selling Plavix in California, and the claims of all plaintiffs arise out of that very activity, selling Plavix, rendering jurisdiction appropriate.

This Court rejected Phillips Petroleum's due process arguments, holding that the due process protections to which absent class members were entitled were fully satisfied by the certification, notice, and opt-out procedures employed by the Kansas courts. *Id.* at 814. More importantly for present purposes, the opinion is devoid of any suggestion that the defendant's due process rights were violated by adjudicating claims of non-Kansas class members (including two of the named plaintiffs) against a non-Kansas defendant and involving non-Kansas leases in Kansas state court. Given Phillips' express due process concerns with the binding effect of the Kansas judgment, it surely would have disputed the court's personal jurisdiction over it if it thought it had a plausible basis to do so. Nor did any Justice of this Court, in a case addressing due process and personal jurisdiction, ever suggest that there was any constitutional problem in forcing Phillips Petroleum to defend its royalty payment practices on non-Kansas leases in Kansas state court.

The situation here is analogous. The California courts propose to adjudicate the claims of all plaintiffs against BMS, both those plaintiffs who reside and were injured in California and those who reside and were injured elsewhere. As in *Shutts*, those claims arise from and relate to a common course of conduct by BMS, carried out nationwide and, in part, in California. The reason no challenge was made to the state court's personal jurisdiction over Phillips Petroleum in *Shutts* is equally applicable here: there simply is no basis to argue either that BMS lacks minimum contacts with California concerning its marketing of Plavix, or that

requiring BMS to defend claims by out-of-state plaintiffs related to that activity somehow offends "fair play and substantial justice."[9]

Another helpful analogy can be drawn from the federal practice of coordinating or consolidating cases filed in multiple districts for pretrial proceedings before a single federal judge through the MDL process established by 28 U.S.C. § 1407. BMS expressly points to this procedure as a preferable alternative to the multi-plaintiff proceedings in California state court pursuant to which Respondents could have achieved "efficiency and judicial economy . . . without undermining principles of personal jurisdiction." Pet'r's Br. 50. But BMS badly misperceives the relevance of § 1407 multi-

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[9] A similar observation can be drawn from *World-Wide Volkswagen*. The only parties that were held not to be subject to personal jurisdiction in Oklahoma for an auto accident that occurred there were Volkswagen's regional distributor World-Wide Volkswagen Corp., which distributed cars only to dealerships in New York, New Jersey, and Connecticut, and its New York-based retail dealership, Seaway Volkswagen, Inc., which sold cars only in the New York metropolitan area. *World-Wide Volkswagen*, 444 U.S. 288-89. This Court found that these defendants had not purposefully directed their activities at Oklahoma and had no minimum contacts there. *Id.* at 295-99. But there is no suggestion whatsoever in the opinion that the Oklahoma courts could not exercise personal jurisdiction over Volkswagen of America, Inc., even though the particular car involved in the underlying accident had not been sold in Oklahoma. To the contrary, the opinion states: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98. And Volkswagen, itself, remained a defendant in the litigation. *Id.* at 288 n.3.

district litigation to the question before the Court; for if federal MDLs do not offend due process, then neither does California's exercise of personal jurisdiction over BMS in this case.[10]

Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation may transfer civil actions pending in multiple district courts to a single district for coordinated or consolidated pre-trial proceedings, so long as the civil actions involve one or more common questions of fact. An MDL may be created, and individual cases transferred, over the objection of some or all of the litigants. Moreover, there is no requirement that the transferee district be one in which all parties have "minimum contacts," or that the parties have any expectation they might be haled into court there. And, because the cases in an MDL retain their individual identity, a party and/or its counsel, whether plaintiff or defendant, can be compelled to participate in extensive pretrial proceedings in this distant forum, potentially at considerable cost in both time and expense. Yet, because of the judicial efficiencies and economies involved in addressing multiple actions involving common questions of fact, no one suggests, least of all BMS, that compelling the parties to conduct all pretrial proceedings in the transferee forum offends

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[10] *Amicus* is unaware of any case explicitly challenging or upholding the constitutionality of federal multi-district litigation pursuant to 28 U.S.C. § 1407. But this Court has, on a number of occasions, addressed the application of the act without raising any concerns about its constitutionality. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

"fair play and substantial justice," thereby violating due process.

The situation here is at least as fair and just. Pursuant to the California rules for coordination of civil actions involving common questions of law or fact, *see* Cal. Code Civ. P. § 404, the Judicial Council of California established a JCCP before a single state court judge for Plavix cases for the convenience of parties and the efficient utilization of judicial resources, and to promote the ends of justice.

Moreover, given that it is undisputed that the California courts have personal jurisdiction over BMS for the claims brought by California plaintiffs, the presence of common questions of fact ensure that the claims of out-of-state plaintiffs against BMS "relate to" and are "connected with" BMS's purposeful conduct in its marketing of Plavix, which took place, at least in part, in California. If it does not offend due process to compel litigants to pursue their claims through pretrial proceedings in a distant federal court in an MDL, even though the litigants may have no prior contacts with that forum, then *a fortiori* it does not offend due process to compel them to litigate their claims in a state court coordinated proceeding where the requirements for personal jurisdiction under *International Shoe* have been met.

## III. State Law Provides Procedural Safeguards to Ensure that Multi-State, Multi-Plaintiff Litigation Does Not Offend Due Process.

It also is important to note that California, like virtually every state, provides numerous procedural safeguards to ensure that litigation involving out-of-state litigants does not offend "fair play and substantial justice." Choice-of-law rules, for example, protect litigants like BMS from being bound by California's substantive social policies when its actions cause injury in another state with different legal standards. *See Burger King*, 471 U.S. at 477. Moreover, if litigation in California is substantially inconvenient, and litigation elsewhere would be more reasonable, a litigant may seek relief through a motion to stay or dismiss the action on the ground of inconvenient forum, the motion traditionally known as *forum non conveniens*. Cal. Code Civ. P. § 418.10(a)(2).

As this Court recognized in *Burger King*, such procedural mechanisms will usually suffice to protect the due process rights of non-residents. 471 U.S. at 477. It will be the rare case in which a defendant "who purposefully has directed his activities at forum residents" will be able to make "a compelling case" as to why the exercise of jurisdiction is nevertheless unconstitutional. *Id.* BMS has not, and cannot, present such a compelling case here.

Meanwhile, if BMS's crabbed view of specific jurisdiction were the law, there would be little, if any, need for choice-of-law rules and *forum non conveniens* motions. If a state court could exercise

jurisdiction only over out-of-state defendants for claims that arose from, and were proximately caused by, the defendant's forum activities, such cases would almost always be governed by forum law, and that state's courts would be, in all likelihood, the most convenient forum in which to adjudicate the dispute.

Yet this Court repeatedly has cited to such procedural mechanisms as important non-constitutional protections available to out-of-state litigants, separate from the jurisdictional inquiry. *See, e.g.*, *Keeton*, 465 U.S. at 778 ("Strictly speaking, . . . any potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the court to adjudicate the claims. . . . [W]e do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry."); *Burger King*, 471 U.S. at 477 (identifying choice-of-law rules and changes of venue as two such procedural accommodations). BMS's approach would relegate all such references to meaningless dicta—yet another reason to reject its artificially narrow understanding of specific jurisdiction.

## IV. State Courts Traditionally Have Exercised Personal Jurisdiction Over Defendants in Multi-State Mass Torts and Class Actions

### A. Principles of Federalism Do Not Limit a State Court's Exercise of Personal Jurisdiction over Out-of-State Parties.

BMS also argues that the strict limits on specific jurisdiction it seeks are required by principles of federalism, "'to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'" Pet'r's Br. 25 (quoting *World-Wide Volkswagen*, 442 U.S. at 292). But that clearly is incorrect. As this Court has recognized: "State courts routinely exercise subject-matter jurisdiction over civil cases arising from events in other States and governed by the other States' laws." *Gulf Offshore Co.*, 453 U.S. at 481.

And, subsequent to *World-Wide Volkswagen*, this Court expressly *rejected* the notion that federalism concerns impose due process limits on a state court's exercise of personal jurisdiction:

> The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not

> as a matter of sovereignty, but as a matter of individual liberty.

*Ins. Corp. of Ireland*, 456 U.S. at 702. The Court went on to note that the Due Process Clause "makes no mention of federalism concerns." *Id.* n.10. "Furthermore," the Court observed, "if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement." *Id.*

### B. State Courts Have Long Overseen Multi-State Mass Tort and Class Action Litigations Concurrently with the Federal Courts.

Indeed, state courts traditionally have exercised jurisdiction over mass tort defendants regardless of their place of incorporation or principal place of business. Some examples include cases involving asbestos, the Dalkon Shield IUS, DES, Fen-Phen, latex gloves, orthopedic bone screws, silicone breast implants, and L-Tryptophan. *See* Federal Judicial Center, *Appendix D: Individual Characteristics of Mass Torts Case Congregations*, at 14, 23-26, 30-31, 37-38, 45-49, 53-55, 80-81 (Jan. 1999), http://www.uscourts.gov/sites/default/files/masstapd_1.pdf.

And State courts have exercised personal jurisdiction over defendants in mass actions, regardless of the location of the plaintiff or the plaintiff's injury. *See, e.g., In re Pelvic Mesh/ Gynecare Litig.*, 426 N.J. Super. 167, 170 (N.J. Super. Ct. App. Div. 2012) ("Several hundred

plaintiffs from many states have individually filed suit in New Jersey against defendants Johnson & Johnson and Ethicon, Inc., alleging they have suffered injuries caused by a line of defendants' medical products."); *Gross v. Gynecare*, No. A-0011-14T2, 2016 WL 1192556, at *1 (N.J. Super. Ct. App. Div. Mar. 29, 2016) (plaintiffs are residents of South Dakota).

Only post-*Daimler* have U.S.-based corporate defendants objected to the personal jurisdiction of state courts, arguing that, because they are not "at home" in the forum, and because *all* of the plaintiffs' claims did not arise out of the defendants' activities in the forum state, the defendant cannot be sued in a consolidated proceeding.

For decades, state and federal judges alike have taken concurrent personal jurisdiction as granted, endeavoring to coordinate their respective mass torts dockets. *See, e.g.*, Federal Judicial Center & National Center for State Courts, *Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges*, at 1 (2013), http://ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/116. "Multijurisdiction litigation poses numerous challenges to the state and federal courts. With mutual respect and two-way communication, however, these challenges can be overcome. There is and should be respect among judges, as well as respect for principles of federalism, both of which foster cooperation to advance multijurisdiction litigation." *Id.*

Similarly, in class actions, this Court has determined affirmatively that state courts have jurisdiction over the claims of out-of-state plaintiffs

in nationwide class actions; personal jurisdiction over the defendants is assumed. *Shutts*, 472 U.S. at 799-802. And mass actions are not the only cases that would be affected by BMS's proposed narrowing of personal jurisdiction.

For example, in *Gulf Offshore Co.*, workers who were injured on an oil rig off the coast of Louisiana brought suit in Texas, and this Court assumed, as a preliminary matter, that Texas courts had personal jurisdiction over oil companies that "do[] business in Texas." 453 U.S. at 477 n.2. Under BMS's approach, jurisdiction could not lie in Texas simply because the corporations would have taken no action in Texas to have caused an injury in Louisiana. As this Court is aware, multi-defendant cases of this ilk regularly appear in federal court, and BMS's proposed rule would make it impossible in some circumstances to litigate the cases in one forum.

### C. State Courts Are Well-Equipped to Adjudicate Mass Torts.

State courts, moreover, offer distinct advantages to litigants and are well-equipped to adjudicate mass tort claims. As Justice O'Connor put it:

> Part of the beauty of our federalism is the diversity of viewpoint[s] it brings to bear on legal problems. State court judges may have a different approach to a problem than might a federal judge; the lessons that can be learned from being a judge in one part of our country will not be immediately obvious to

> those who have always lived, practiced, and judged in another part.

Justice Sandra Day O'Connor, *Proceedings of the Middle Atlantic State-Federal Judicial Relationships Conference*, 162 F.R.D. 173, 181 (1994). "A federal court's viewpoint is not, by its nature, superior to that of a state court." *Id.* at 183. In particular, as this Court has recognized, "State judges have greater expertise in applying [tort] laws . . . ." *Gulf Offshore Co.*, 453 U.S. at 484.

With regard to mass torts in particular, in 2003, the National Center for State Courts reported that 98% of mass tort cases were ultimately resolved in state courts. National Center for State Courts, *Mass Torts: Lessons in Competing Strategies and Unintended Consequences*, 2 Civ. Action, no. 2, at 1 (Spring 2003), http://cdm16501.contentdm.oclc.org/cdm/ref/collection/civil/id/51. And state courts regularly proceed with discovery in mass torts well prior to the formation of any federal MDL. *See In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2738, slip. op. at 2-3, (J.P.M.L. Oct. 4, 2016), http://www.jpml.uscourts.gov/sites/jpml/files/MDL-2738-Initial_Transfer-09-16.pdf. Some states, like California, have even developed their own systems for coordinating mass tort litigations.

Importantly, state multidistrict litigation is regarded as being significantly faster than federal multidistrict litigation. *See* Hon. Larry V. Starcher, *Proceedings of the Middle Atlantic State-Federal Judicial Relationships Conference*, 162 F.R.D. at 205 ("Plaintiffs' attorneys forum-shop for not illegitimate

reasons, such as speed of resolution . . . . Defendants' attorneys 'milk the process and proceed at the rate that they see as most financially rewarding.'"). Unfortunately, for many plaintiffs in mass torts, delay can literally mean that they do not live to see justice.

Due process does not demand such a result.

## CONCLUSION

For the foregoing reasons, *amicus curiae* Public Justice, P.C., urges this Court to affirm the ruling below and to remand this case for further proceedings.

Respectfully submitted,

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APRIL 7, 2017

FILED
MAR - 8 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-466

# In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, ET AL.,

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA*

## BRIEF FOR REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TEXAS ASSOCIATION OF BROADCASTERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are nonprofit associations that support and advocate for broadcasters and publishers in the United States and Mexico on issues relating to freedom of speech and the press:

- The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.
- The Texas Association of Broadcasters ("TAB") is a non-profit organization that represents more than 1,200 free, over-the-air television and radio broadcast stations licensed by the Federal Communications Commission to serve communities throughout Texas. Founded in 1951, TAB advocates on the industry's behalf before State and Federal policymakers on issues ranging from Open Government and media law to various regulatory matters. TAB also provides numerous direct services to member stations, including the publication of guide-

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, and their counsel made any monetary contribution to this brief's preparation and submission. The parties consented to the filing of this brief.

books on legal issues involving newsrooms, advertising and regulatory compliance.

*Amici* share Petitioner's interest in clear and predictable standards for determining personal jurisdiction. In libel and privacy cases, plaintiffs frequently attempt to hale broadcasters and publishers into jurisdictions that have no connection with the reporting being challenged. In such cases, the specific jurisdiction analysis often turns on the "relatedness" of other forum contacts, such as the defendant's general marketing and promotional efforts.

*Amici* and their members support an appropriately rigorous "relatedness" standard that requires a causal connection between forum contacts and a plaintiff's claims. *See* Brief of Texas Association of Broadcasters, Reporters Committee for Freedom of the Press, National Chamber of the Industry of Radio and Television in Mexico, and Independent Radio Association of Mexico as *Amici Curiae* in Support of the Petitioners in *TV Azteca, S.A.B. de C.V. v. Ruiz*, No. 16-481 (filed Nov. 14, 2016). They respectfully submit this brief to show how the Court's resolution of the personal jurisdiction issue in this case may impact the ability of broadcasters and publishers to gather and report the news.

## INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, the dual principles of fair warning and predictability have been at the core of this Court's personal jurisdiction jurisprudence. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980). The Court has consistently favored

clear jurisdictional standards that permit defendants "'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 (2014) (quoting *Burger King*, 471 U.S. at 472). This jurisdictional predictability "is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). When companies know where they may be sued, they can identify the laws that will govern their conduct and ensure compliance with those laws.

In cases involving news reporting on matters of public concern, a defendant's interest in jurisdictional predictability is not merely commercial. Libel, privacy, and other related claims are often governed by state laws that may differ materially across jurisdictions. In light of these varying standards, broadcasters and other publishers need to know, with as much certainty as possible, which jurisdiction's laws will likely govern their newsgathering and reporting activities. Uncertainty breeds self-censorship, as publishers may feel compelled to conform their activities to the legal standards of jurisdictions that provide the least protection for free speech.

The analysis of the California Supreme Court in this case, like that of the Texas Supreme Court in the pending *TV Azteca* case, threatens such a chilling effect. The California Supreme Court's decision employs an amorphous "substantial connection" test that requires no but-for or proximate causal nexus between a plaintiff's claims and a defendant's forum contacts. *See Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 377 P.3d 874, 885 (Cal. 2016). Similar-

ly, the Texas Supreme Court's decision in *TV Azteca* eschews this Court's "focal point" test from *Calder v. Jones*, 465 U.S. 783 (1984), and rejects the majority causation approach for determining the "arises out of or relates to" element of specific jurisdiction.

If left uncorrected, these murky standards will undermine the jurisdictional predictability on which the news media relies to investigate and report vigorously on matters of public concern. This detrimental impact will intensify as current industry trends continue. Facing the erosion of traditional revenue sources, broadcasters and publishers are embracing diversified business models that include a variety of products, platforms, and services unrelated to any specific reporting. Many broadcasters and publishers produce concerts, conferences, and other special events for local communities, sell branded merchandise, operate e-commerce businesses, and design digital products and tech solutions for other companies. These new revenue streams make it possible for them to continue investing in their journalism operations, which are often more vital to the public interest than to the corporate balance sheet. But broad, unmoored jurisdictional analyses like those of the California and Texas Supreme Courts threaten to subject broadcasters and publishers to near-universal jurisdiction based on such general business and promotional activities. At a minimum, the decisions leave broadcasters and publishers unable to identify which of these activities could give rise to specific jurisdiction.

Jurisdictional unpredictability is not the only problem created by these decisions. Under the Texas Supreme Court's decision, for example, a Mexican broadcaster and a Mexican journalist have been

haled into U.S. court in a libel suit filed by Mexican citizens over reporting on events that transpired predominantly in Mexico and entirely outside the United States. This unreasonable exercise of jurisdiction threatens to spark reciprocal, retaliatory measures against U.S. broadcasters and publishers by foreign jurisdictions that lack First Amendment-style speech protections.

Although the facts of this case do not directly implicate the same international concerns, the California Supreme Court's analysis could certainly lead to the same result. Thus, affirming the California Supreme Court's jurisdictional analysis would exacerbate the problems of international comity and reciprocity exemplified by the Texas Supreme Court's decision.

## I. Jurisdictional Standards for Determining the "Relatedness" of Forum Contacts Are Increasingly Relevant to Broadcasters and Publishers.

It has been three decades since the Court last decided a personal jurisdiction issue in a libel case involving the media. *See Calder*, 465 U.S. at 791; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). Notably, both *Calder* and *Keeton* involved print distribution. The mechanics of print distribution—of sending physical copies of a publication to subscribers and retailers pursuant to contractual agreements—differ dramatically from the distribution of broadcast and online content. These differences raise important jurisdictional concerns, as broadcasters and publishers now find themselves distributing content across jurisdictional boundaries with the click of a button. The "signal spillover" at issue in *TV Azteca*

illustrates these concerns, which are made increasingly relevant with internet and social media distribution of content. Moreover, recent economic trends have spurred broadcasters and publishers to expand their business models well beyond content distribution, offering goods and services unrelated to any specific reporting and raising questions of how such contacts should play in the jurisdictional analysis. Thus, even though this case does not involve libel or privacy claims, the Court's decision and the "relatedness" standard it adopts will broadly impact broadcasters and publishers.

### A. The "signal spillover" seen in *TV Azteca* affects numerous major media markets across the country.

The jurisdictional issues presented in *TV Azteca* are, in large part, the result of a phenomenon called "signal spillover," which affects broadcasters near state or national borders. Broadcast signals cannot be aimed in a specific direction or kept away from a specific state or country without violating the provisions of the licenses granted by the Federal Communications Commission. *See generally* Andrew L. Stoler, *The Border Broadcasting Dispute: a Unique Case Under Section 301*, 6 MD. J. INT'L L. 39, 40-41 (1980). Thus, broadcasters operating in border regions are unable to prevent their content from "spilling over" jurisdictional lines. This phenomenon is not limited to television broadcasters; AM and FM radio broadcasters also experience signal spillover.

Numerous major media markets in the United States are affected by signal spillover. AM radio stations hundreds of miles from the border in San Antonio, Austin, and Houston can be heard in northern

Mexico. Similarly, listeners in Texas can receive broadcasts originating from deep in Mexico. For example, the South Texas community of McAllen receives radio signals from sixty-two different stations, more than half of which are based in Mexico. Border cities like San Diego and El Paso also receive almost as many transmissions from Mexico as from the United States. And communities located near the northern border of the United States, such as Seattle and Detroit, receive stations broadcasting from Canada.

Signal spillover across state borders is even more prevalent. Nearly every state has media markets served by broadcasters from bordering states. For example, Boston-based stations transmit into Rhode Island, Connecticut, and New Hampshire. The New York television and radio markets include parts of New Jersey and Connecticut. Broadcasts from Atlanta stations reach Tennessee. Phoenix broadcasters reach California, just as San Diego broadcasters reach Arizona. And Detroit stations, which reach Canada, also send signals into Ohio. This signal spillover affects numerous major media markets and millions of viewers and listeners.

### B. Unclear personal jurisdiction standards also affect all broadcasters and publishers that distribute content online.

Broadcasters in border areas are not the only media affected by cross-jurisdictional content distribution. Indeed, the *TV Azteca* court noted the "similarities" between broadcast signals that cross borders and online content that is frequently accessible worldwide. 490 S.W.3d at 44 n.8. Moreover, it is impossible to distinguish between "online" and other

types of publishers. *Cf. Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014) (describing technology that involved "broadcast television programming over the Internet, virtually as the programming is being broadcast"). Today, virtually all publishers are online publishers. This is certainly true for broadcasters, nearly all of whom also publish online. Television and news radio stations publish reports on their websites, along with additional content such as extended interviews with sources, key documents, or timely updates to on-air reports. They also stream live video—sometimes the same video that is being simultaneously broadcast over the air.

The distinction between print and online media has also long since collapsed. For years, newspapers and magazines have published content through their websites. Like broadcasters, they also publish news and commentary through Twitter and through partnerships with Facebook and Snapchat. *See, e.g.*, Steven Perlberg & Deepa Seetharaman, *Facebook Signs Deals With Media Companies, Celebrities for Facebook Live*, THE WALL STREET JOURNAL (June 22, 2016, 9:44 AM), https://goo.gl/M9Cyd5 ("[Facebook's] partners include established media outfits like CNN and the New York Times [and] digital publishers like Vox Media, Tastemade, Mashable and the Huffington Post[.]"). Many broadcasters and publishers even offer content through their own smartphone and tablet apps. *See, e.g.*, Kara Bloomgarden-Smoke, *No Escape From 'The New Yorker': How the proudest and stodgiest of legacy publications transformed into a multimedia juggernaut*, OBSERVER (Jan. 27, 2016, 1:46 PM), https://goo.gl/dWXH5l (print magazine publisher now also offering a podcast, web-exclusive content,

and its own television series available through Amazon.com).

In this multi-platform environment, the impact of a personal jurisdiction standard that does not require a sufficient causal nexus between suit-related conduct and the forum state is not limited to broadcasters. Jurisdictional standards that purport to apply only to one platform (for example, over-the-air broadcasts or magazine subscriptions) are unworkable and out-of-step with the reality of modern media. Decisions in the products liability context, as in this case, and in the broadcast context, as in *TV Azteca*, cannot be ignored by online publishers. And because all broadcasters and publishers are online publishers, decisions applying unpredictable personal jurisdiction standards affect them all.

### C. Broadcasters and publishers are increasingly engaging in activities unrelated to any specific reporting, thus raising questions about the "relatedness" of such contacts.

The broad impact of the Court's decision in this case will be magnified as libel and privacy plaintiffs attempt to base specific jurisdiction on contacts by broadcasters and publishers that have no causal connection to the content giving rise to the plaintiffs' claims. For example, in *TV Azteca*, after holding that specific jurisdiction could not be based solely on the accessibility of the defendant's broadcasts within the forum, the Texas Supreme Court considered numerous general business and promotional activities that petitioners conducted in Texas. *TV Azteca*, 490 S.W.3d at 49-51. The court failed, however, to connect any of these contacts to the specific reports being

challenged in the case. *Id.* And by refusing to identify precisely which of these general business and promotional contacts made the difference in its jurisdictional analysis, the Texas Supreme Court effectively made all of them relevant.

Likewise, in affirming the exercise of personal jurisdiction in this case, the California Supreme Court relied on Bristol-Myers's general activities, such as "nationwide marketing, promotion, and distribution" of a medication and "research and development activity in California." *Bristol-Myers*, 377 P.3d at 887-88. The court relied on these contacts even though they were not related to the medication over which the plaintiffs sued.

Unfortunately, these decisions—and, specifically, their reliance on forum contacts that lack a causal nexus to the claims at issue in the cases—come at a time when broadcasters and news organizations are generating more such contacts by engaging in business ventures and promotional activities to diversify their revenue streams and build their brands. These initiatives are not tied to specific articles or reports. But they form an essential part of a broadcaster's or news organization's overall strategic plan for ensuring that its reporting operations have the necessary funding to survive in this challenging economic environment.

For example, many online publishers now operate e-commerce businesses, in addition to their publishing operations. *See* Lucia Moses, *The newest rainmaker at publishers: E-commerce editors*, DIGIDAY (April 12, 2016), https://goo.gl/4ytZQe. These e-commerce operations connect readers directly to product vendors like Amazon.com, in return for which

publishers frequently receive a commission. *See* Nick Niedzwiadek, *Vox to Join Other Media Companies in E-Commerce Push*, THE WALL STREET JOURNAL (Feb. 11, 2016, 6:00 AM), https://goo.gl/FGr80J. Other e-commerce operations by media companies focus on business-to-business technology solutions. *See* Scott Vaughan, *B2B Media Company Transformation Means More Data for Marketers*, CMO (Nov. 30, 2015), https://goo.gl/GNKXPz.

In addition to e-commerce ventures, publishers are increasingly involved in sponsoring or organizing events such as conferences, trade shows, and leadership summits. *See, e.g.*, Paula Froelich, *Can Conferences Save the Media Industry?*, DIGIDAY (Sept. 9, 2013), https://goo.gl/4M747p. These events take place across the country, often outside the state in which a publisher is based. *See, e.g.*, https://goo.gl/k7PzlP (listing conferences organized by *The Wall Street Journal*, including events in New York, California, and Washington, D.C.); *see also* https://goo.gl/S52zIH (listing conferences organized by *The Atlantic*, including events in St. Louis, Phoenix, New York, Washington, D.C., and Mountain View, California). The events are not focused on specific reporting, but on general topics and themes, functioning as an important component of a publisher's overall brand-building strategy. *See* Lucia Moses, *Inside the Atlantic's events juggernaut*, DIGIDAY, https://goo.gl/vdnVr1 (July 22, 2014) (noting that *The Atlantic* puts on more than 125 events per year).

Because these types of general business and brand-building initiatives are not connected to specific articles or reports, they should be irrelevant to the specific jurisdiction analysis in a libel suit, which fo-

cusses solely on suit-related conduct. Indeed, as the petitioners in *TV Azteca* demonstrated, such general contacts are irrelevant under the tests applied in most federal circuits and state courts of last resort. *See* Petition for a Writ of Certiorari at 23-27, *TV Azteca, S.A.B. de C.V. v. Ruiz*, No. 16-481 (filed Oct. 7, 2016). But the reliance of the California and Texas Supreme Courts on sales ties, marketing, and promotional activities unrelated to the product or reporting being challenged opens the door to a broad and unpredictable jurisdictional inquiry into other general business activities—at a time when more broadcasters and publishers are relying more heavily on them.

## II. The Jurisdictional Uncertainty Created by the Decisions of the California and Texas Supreme Courts Will Chill Reporting on Matters of Public Concern.

The broad impact of the California and Texas Supreme Courts' decisions on broadcasters and the news media is problematic. These decisions and others that fail to require a rigorous causal nexus deprive publishers of the jurisdictional predictability they need to ensure that their newsgathering and reporting activities comply with the substantive legal standards in the jurisdictions where they might face suit. Although much of the law governing newsgathering and reporting has been constitutionalized, state statutes and common law standards still govern much of what broadcasters and journalists do. These state standards can vary significantly across jurisdictions, and this variation can influence how the media investigates and reports the news.

For example, state laws often determine how the news media cover allegations made in the context of

government activities and official proceedings, such as charges made in a criminal indictment or claims made in a civil lawsuit. The broadcasters and news media are generally not in a position to independently verify the truth of these allegations. Reporters might not have access to the facts that support or contradict the allegations, or those facts might not yet have been determined. Nevertheless, the fact that the allegations have been made is newsworthy.

Recognizing the critical importance of the news media's ability to report on governmental activities and official proceedings, most states have adopted some form of the "fair report" privilege. *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977). Where this privilege applies, the broadcasters and news media are allowed to report allegations made by government officials and others without having to independently substantiate the allegations. *Id.* Thus, application of the "fair report" privilege means that, in a libel suit, a media defendant generally must show only that the allegation at issue was made and accurately reported, not that it is true. *Id.*

The contours of each state's "fair report" privilege vary significantly. For example, in some states, communications made by government officials acting outside the course of official proceedings—but still on matters of public concern—may not be covered by the "fair report" privilege. *See, e.g.*, *Norton v. Glenn*, 860 A.2d 48, 52 n.6 (Pa. 2004) (suggesting privilege might apply only to statements made "in the course of official proceedings"); *see also Jones v. Taibbi*, 512 N.E.2d 260, 267 (Mass. 1987) ("We conclude that unofficial statements made by police sources are outside the scope of the fair report privilege."). In other

states, allegations made in preliminary criminal proceedings or allegations that commence civil proceedings may not be covered. *See, e.g., Stone v. Banner Publ'g Corp.*, 677 F. Supp. 242, 246 (D. Vt. 1988) (privilege does not apply to articles relying on preliminary police investigation, including a police incident report); *see also Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1178 (D. Colo. 1999) ("Colorado courts have consistently adhered to the original Restatement rule which precludes a defamation defendant from invoking the judicial proceedings privilege on the basis of a filed complaint alone."). And allegations in sealed records or in other nonpublic documents may or may not be covered, depending on the scope of the state's "fair report" privilege. *Compare Wynn v. Smith*, 16 P.3d 424, 429-30 (Nev. 2001) (per curiam) (Nevada privilege does not protect report of contents of confidential Scotland Yard report) *with Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1434-35 (9th Cir. 1992) (California privilege protects reports on family court proceedings where general public is excluded).

In some states, however, the protections for reporting on allegations are much broader. Texas, for example, recently passed a statute that broadly protects the news media's "accurate reporting of allegations made by a third party regarding a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 73.005(b). There is no requirement that the allegations be made in public documents, or in the course of official proceedings, or have been acted on by the government. The Texas law requires only that the allegations relate to a matter of public concern and that the media accurately report them. *Id.*; *cf.* TEX. CIV. PRAC. & REM. CODE § 73.002(b) (providing separate,

narrower privilege for "fair, true, and impartial account[s]" of various official proceedings).

Even where it is clear that the "fair report" privilege or some similar protection applies, there are important state-law differences affecting how broadcasters and other publishers should report on allegations made in official proceedings, such as whether they must investigate and report additional background information or the ultimate result of the proceedings. In some states, the failure to report such information can expose a broadcaster or publisher to a libel claim. *See, e.g.*, *Fortenbaugh v. N.J. Press, Inc.*, 722 A.2d 568, 574 (N.J. Super. Ct. App. Div. 1999) ("Defendants were obligated to flesh out the report to reflect the true nature of the accusation referred to and its ultimate conclusion."). In other states, the media may, but are not required to, report such information. *See, e.g.*, *KBMT Operating Co., LLC v. Toledo*, 492 S.W.3d 710, 711 (Tex. 2016) (broadcaster's reporting with and without additional information held nonactionable). And some states have held that the privilege may be defeated by the reporting of additional information outside the scope of the privilege. *See, e.g.*, *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 333 (Minn. 2000).

These issues relating to whether and how the news media may report on government activities and other matters of public concern represent only a few examples of the myriad ways in which variations in state libel and privacy laws affect newsgathering and reporting. There are many others. A journalist's ability to obtain information from a confidential source may depend on state law, which may be different on opposite sides of the border. California, for

example, provides stronger protections for confidential sources than does its neighbor, Arizona. *Compare* CAL. CONST., art. I, § 2(b), *with* ARIZ. REV. STAT. ANN. § 12-2237, *and Matera v. Superior Court*, 825 P.2d 971, 973-75 (Ariz. Ct. App. 1992). Arizona, however, makes it easier for reporters to use information from audio or video recordings. *Compare* CAL. PENAL CODE § 632 (recording of calls requires consent of both parties) *with* ARIZ. REV. STAT. ANN. § 13-3005 (consent of only one party required).

If broadcasters and publishers are unable to predict where they might be sued, they will be forced to conform their newsgathering and reporting activities to the least-protective state standards. This will result in a less vigorous press, as an abundance of caution will replace the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see N.Y. Times Co. v. Connor*, 365 F.2d 567, 571, 573 (5th Cir. 1966) (refusing to apply a minimum-contacts jurisdictional rule in a press case, citing the threat to free speech). The challenged decisions of the California Supreme Court and the Texas Supreme Court threaten just such a chilling effect.

## III. Jurisdictional Standards Lacking Causal Nexus Requirements Subject Foreign Broadcasters and Publishers to Unreasonable Burdens and Expose U.S. Broadcasters and Publishers to the Reciprocal Exercise of Jurisdiction by Foreign Countries Lacking Strong Speech Protections.

In addition to jurisdictional unpredictability, decisions like those of the California and Texas Supreme Courts impose unreasonable burdens on broadcasters and publishers in the U.S. and abroad. In Texas, by eschewing *Calder*'s "focal-point" test and rejecting the majority causation approach, the Texas Supreme Court expanded the jurisdictional inquiry to include numerous contacts unrelated to the specific reporting being challenged in the case. The court cited more than a dozen different general business and promotional contacts, tacitly suggesting that all of them could be relevant in determining whether specific jurisdiction exists. *TV Azteca,* 490 S.W.3d at 50-51.

Similarly, the California Supreme Court relied on general business contacts like research and development unrelated to the medication at issue in the case and on "nationwide marketing, promotion, and distribution" of the medication. *Bristol-Myers*, 377 P.3d at 887-88. In doing so, the California Supreme Court explicitly rejected the need for a causal nexus between such contacts and the plaintiff's claims:

> [T]he more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim. *Thus, [a] claim need not arise directly from the defendant's forum contacts in order to*

> *be sufficiently related to the contact to warrant the exercise of specific jurisdiction*[.]

*Id.* (citations and internal quotation marks omitted) (emphasis added).

This analysis improperly conflates general and specific jurisdiction, thus making it more difficult for defendants—including broadcasters and publishers—to predict where they will be sued. Moreover, this analysis also affects how jurisdictional issues are litigated. Before a court can determine whether such contacts can sustain personal jurisdiction over the defendant, the plaintiff will be given an opportunity to conduct discovery into those contacts.

Broad jurisdictional discovery imposes substantial burdens on the defendant and on the court, which must resolve any discovery disputes. As this Court recognized in *Hertz*, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. 559 U.S. at 94 (citing *Navarro Sav. Ass'n. v. Lee*, 446 U.S. 458, 464, n.13 (1980)); *see also Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 745 (2013) ("[J]urisdictional tests, often applied at the outset of a case, should be 'as simple as possible.'" (quoting *Hertz*, 559 U.S. at 80)). The California and Texas Supreme Courts' analyses will result in the dramatic expansion of jurisdictional discovery in libel cases, well beyond the specific reporting being challenged, thus exposing defendants to expensive and time-consuming discovery on an increasingly wide range of commercial and promotional activities. The California Supreme Court's decision promises to have a sim-

ilar effect, both for media defendants and for corporations facing product liability suits.

Such broad jurisdictional discovery is particularly problematic for foreign broadcasters and publishers, many of whom are located in countries that do not approve of U.S.-style civil discovery. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 115 (1987) ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." (citation omitted)); *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) (noting the possibility of discovery for foreign defendants could deter business activity in the United States). Indeed, some foreign nations, such as France, have even passed "blocking statutes" designed to prohibit companies from complying with U.S. civil discovery demands. *See, e.g.*, Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts*, 969-73 (5th ed. 2011). These countries require strict compliance with the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, which has caused tension between foreign defendants and U.S. courts. *See, e.g., In re Vivendi Universal, S.A. Sec. Litig.*, No. 2-CV-5571RJHHBP, 2006 WL 3378115 (S.D.N.Y. Nov. 16, 2006) ("[I]n deciding whether discovery should proceed under the Hague Convention or the Federal Rules of Civil Procedure, 'American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.'" (quoting *Société Nationale Industrielle*

*Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 546 (1987))). Decisions applying amorphous personal jurisdiction standards in border states like Texas and California exacerbate this tension, placing unreasonable burdens on foreign broadcasters and publishers before the issue of personal jurisdiction is even decided.[2]

As a result of these unreasonable burdens, the decisions of the California and Texas Supreme Courts also expose U.S. broadcasters and publishers to the reciprocal exercise of jurisdiction by foreign countries. *See* American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* § 5, p. 82 (2006) ("[N]on-U.S. courts . . . have often applied their domestic standards of defamation, thus raising public-policy concerns when enforcement of the foreign judgment is sought in the United States."); *cf. Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 450 (1979) (noting the possibility that foreign governments would retaliate against chaotic state standards on an issue of international importance). The prospect of such retaliatory measures is especially troubling because most foreign countries lack the strong protections for speech and press that are guaranteed under U.S. law, including the First Amendment. *See Developments in the Law — The Law of Media: Internet Jurisdiction: A Comparative Analysis*, 120 HARV. L. REV. 1031,

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[2] The burdens associated with broad jurisdictional discovery in a foreign country or other state are also particularly problematic for individual anchors, communicators, and journalists. These individuals may lack the resources to comply with broad jurisdictional discovery requests and thus are vulnerable to attempts by plaintiffs to chill speech through meritless, yet costly, litigation.

1037 (2007) ("The contrast between U.S. free speech jurisprudence and foreign approaches that value reputation over speech reveals that the First Amendment is 'a recalcitrant outlier to a growing international understanding of what the freedom of expression entails.'" (quoting Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3, 12-13 (1980))).

Even in Commonwealth nations, with which the U.S. shares a common-law tradition, the differences in their respective libel laws are stark:

> British law "in the main loads the dice very heavily in the plaintiff's favour." Australia similarly considers defamation a strict liability tort and does not require public figures to prove actual malice. Canada's plaintiff-friendly libel laws presume damage, do not require actual malice, and place the burden on the defendant to prove the material's substantial truth.

*Id.* at 1037-38 (citations omitted). These differences, and the enforcement of foreign libel law against U.S. publishers, led Congress to unanimously pass the SPEECH Act in 2012. *See generally* John B. Bellinger & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 VA. J. INT'L L. 501, 534-35 (2014). The SPEECH Act "allow[s] American defendants to block enforcement of foreign defamation judgments that do not comply with the free speech requirements of the First Amendment." *Id.*; *see also* 28 U.S.C. §§ 4101-05 (2012).

Although the California Supreme Court's decision in this case does not directly involve concerns of international comity and reciprocity, its logic could easily cause international difficulties in future cases. The Texas Supreme Court's decision illustrates this problem in the context of a similar personal jurisdiction standard that does not require a sufficient causal nexus. Notably, the Texas Supreme Court recognized the legitimacy of international reciprocity concerns, yet it asserted that the concerns were not implicated by its decision because the *TV Azteca* petitioners had "intentionally targeted Texas[.]" *TV Azteca,* 490 S.W.3d at 56. But where "intentionally targeting Texas" consists of such general sales and promotional activities as the Texas Supreme Court cited in its decision, the court's reassurance rings hollow. Indeed, the Texas Supreme Court's decision is problematic precisely because it subjects foreign broadcasters and publishers to specific jurisdiction, even where the conduct at issue does not "intentionally target Texas."

The California Supreme Court's decision is at least equally problematic. California exercised jurisdiction over "a nonresident defendant sued by a nonresident plaintiff for injuries occurring outside the state." *Bristol-Myers*, 377 P.3d at 889. These contacts included marketing, sales revenues, relationships with distributors, research and development facilities, and persons employed by Petitioner in California. *Id.* at 889-90. Like the foreign broadcasters in *TV Azteca*, foreign media organizations and multinational corporations could easily find themselves subject to specific jurisdiction under this reasoning.

Indeed, specific jurisdiction would have an even broader reach under the California Supreme Court's

analysis than under that of *TV Azteca*, where the plaintiff lived and allegedly suffered injury in Texas. The California Supreme Court acknowledged that "the nonresident plaintiffs *have no connection to and did not suffer any [medication]-related injuries in the state.*" *Id.* at 890 (emphasis added). Because the court chose to focus on general contacts with the forum and apply a general-jurisdiction-type analysis, California's specific jurisdiction standard has become completely unmoored from the requirements of due process. A foreign defendant could be haled into court based on any promotional, marketing, research, or other activities in a particular forum, even if those contacts were not causally connected with a plaintiffs' suit.

Unless corrected, the fallout from the decisions of the California and Texas Supreme Courts will be swiftly felt by U.S. companies, broadcasters, and publishers alike.

## CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court reverse, and make clear that courts may not assert personal jurisdiction absent sufficient suit-related contacts with the forum.

Respectfully submitted.

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MARCH 8, 2017

RECORD AND BRIEFS

MAR - 9 2017

No. 16-466

IN THE
# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA,
SAN FRANCISCO COUNTY, ET AL.,
*Respondents*.

**On Writ of Certiorari to the Supreme Court of California**

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME AND BRIEF OF TV AZTECA, S.A.B. DE C.V., PATRICIA CHAPOY, AND PUBLIMAX, S.A. DE C.V. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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March 9, 2017

IN THE

# Supreme Court of the United States

No. 16-466

BRISTOL-MYERS SQUIBB COMPANY,
*Petitioner*,

v.

SUPERIOR COURT OF CALIFORNIA,
SAN FRANCISCO COUNTY, ET AL.,
*Respondents*.

**On Writ of Certiorari to the Supreme Court of California**

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME

Pursuant to Rule 21 of the Rules of this Court, *amici* TV Azteca, S.A.B. de C.V., Patricia Chapoy, and Publimax, S.A. de C.V., respectfully move for leave to file the accompanying brief as *amici curiae* in support of petitioner out of time. Counsel for both petitioner and respondents have consented to the filing of *amici*'s brief out of time.[1]

*Amici* are Mexican TV broadcasters and journalists who face civil litigation in Texas state court, based upon an extreme decision of the Texas Supreme Court that affirmed the exercise of personal jurisdiction in a defamation case brought by Mexican national plaintiffs, and where all of the operative facts occurred in and concern Mexico, not Texas. *See*

[1] Counsel for both petitioner and respondents previously submitted letters granting blanket consent to the filing of *amicus* briefs in this case.

*TV Azteca, S.A.B. de C.V. v. Ruiz*, 490 S.W.3d 29 (Tex. 2016), *pet. for cert. pending*, No. 16-481 (U.S. filed Oct. 7, 2016) (briefs distributed on February 22, 2017, for conference on March 17, 2017). *Amici* TV Azteca (a Mexican national network) and affiliated persons and entities face suit in Texas notwithstanding that they have no connection to the State other than the fact that their television broadcasts that originate and air in Mexico may be picked up in southern Texas through over-the-air signal spillover (and through cable carriers that, without the consent of the broadcasters, carry such over-the-air signals). The Texas Supreme Court has held that the State can exercise personal jurisdiction over TV Azteca and Publimax because of general marketing and other commercial efforts in Texas that are wholly unrelated to their allegedly defamatory television broadcasts. *Amici* thus have a substantial interest in the outcome of this case.

*Amici* share petitioner's belief that the law of personal jurisdiction should promote the core policies of the Due Process Clause, including permitting potential defendants to predict and control their jurisdictional exposure. Moreover, like petitioner, *amici* believe that causation is an indispensable component of the specific-jurisdiction inquiry.

On January 19, 2017, the Court granted the petition for a writ of certiorari in this case. Pursuant to this Court's Rule 25.1, petitioner's opening merits brief was due 45 days after the petition was granted, which in this case was Monday, March 6, 2017.[2]

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[2] Because the 45th day after the petition was granted fell on Sunday, March 5, pursuant to this Court's Rule 30, petitioner's opening merits brief would have been considered timely filed on Monday, March 6.

Pursuant to this Court's Rule 37.3(a), *amicus* briefs supporting a petitioner are due 7 days after the petitioner's brief is filed. With a due date of March 6 for petitioner's opening merits brief in this case, counsel for *amici* fully expected to file the accompanying *amicus* brief on March 13 and had taken all the necessary steps to ensure a timely filing. However, unbeknownst to counsel for *amici* until late in the afternoon on March 8, counsel for petitioner filed its opening merits brief on March 1, 2017, five days before it was due. That unexpectedly early filing triggered this Court's Rule 37.3(a) 7-day filing requirement, which meant that *amici*'s brief was due for filing that very same day, March 8.

Although counsel for *amici* worked diligently to finalize the brief for timely filing under the unexpectedly early filing schedule, counsel was unable to complete the brief, to have it printed and bound, and to obtain the necessary client approvals from his foreign clients in time to meet the new deadline.

For the foregoing reasons and for good cause, counsel for *amici* respectfully move for leave to file the accompanying brief as *amici curiae* in support of petitioner out of time.

Respectfully submitted,

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March 9, 2017

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are Mexican TV broadcasters and journalists who face civil litigation in Texas state court, based upon an extreme decision of the Texas Supreme Court that affirmed the exercise of personal jurisdiction in a defamation case brought by Mexican national plaintiffs, and where all of the operative facts occurred in and concern Mexico, not Texas. *See TV Azteca, S.A.B. de C.V. v. Ruiz*, 490 S.W.3d 29 (Tex. 2016), *pet. for cert. pending*, No. 16-481 (U.S. filed Oct. 7, 2016) ("*TV Azteca* Cert. Pet."). *Amici* TV Azteca (a Mexican national network) and affiliated persons and entities face suit in Texas notwithstanding that they have no connection to the State other than the fact that their television broadcasts that originate and air in Mexico may be picked up in southern Texas through over-the-air signal spillover (and by cable carriers that, without the consent of the broadcasters, carry such over-the-air signals). The Texas Supreme Court has held that the State can exercise personal jurisdiction over TV Azteca and Publimax because of general marketing and other commercial efforts in Texas that are wholly unrelated to their allegedly defamatory television broadcasts. *Amici* thus have a substantial interest in the outcome of this case.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represents that all parties submitted letters granting blanket consent to the filing of *amicus* briefs and further consented to the filing of this brief out of time.

*Amici* share petitioner's belief that the law of personal jurisdiction should promote the core policies of the Due Process Clause, including permitting potential defendants to predict and control their jurisdictional exposure. Moreover, like petitioner, *amici* believe that causation is an indispensable component of the specific-jurisdiction inquiry.

## SUMMARY OF ARGUMENT

The Court should reaffirm that specific jurisdiction requires that the defendant's forum-related conduct must have a causal connection to the plaintiff's claims. In recent years, this Court has explained that, under the rubric of specific jurisdiction, a defendant's "*suit-related conduct* must create a substantial connection with the forum State," *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (emphasis added), and that lower courts should take care not to "elide[] the essential difference between case-specific and all-purpose (general) jurisdiction," *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011). As nine federal courts of appeals and numerous state courts of last resort have already held in the decades since this Court's decision in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984),[2] causation is critical to promoting the core policies of the Due Process Clause, which seeks to ensure predictability and fairness in the exercise of personal jurisdiction. In short, specific and general jurisdiction must be confined to their appropriate and separate spheres for potential defendants to predict and control their jurisdictional exposure.

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[2] The First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – as well as at least nine state courts of last resort, approximately half to address the issue – have adopted a causation requirement. *See TV Azteca* Cert. Pet. 13-16 & nn.3-5.

The Court should reverse the decision below because the "substantial connection" test adopted by the California Supreme Court contravenes these principles. In eschewing a causation requirement, the court below improperly blended together suit-related and suit-unrelated contacts and thereby undermined the distinction between specific and general jurisdiction that is critical to due process protections.

Although *Bristol-Myers Squibb* concerns a nationwide products-liability action brought in California state court, the substantial-connection test has been applied by a stubborn minority of courts in a wide variety of legal contexts. The Texas Supreme Court's decision in *TV Azteca* exemplifies the erroneous approach that such courts have taken: it found *amici* were subject to specific jurisdiction in Texas state court based upon news reports that were made in Mexico, for Mexican viewers, by Mexican networks and television stations featuring Mexican journalists, relying upon Mexican sources, and concerning the activities of Mexican citizens in Mexico and Brazil. *TV Azteca*, 490 S.W.3d at 48.

The Texas Supreme Court reached this counter-intuitive conclusion by virtue of a "substantial connection" test that, like the one applied by the California courts, expressly disavows any requirement of causation. As the Texas Supreme Court explained, the substantial-connection test "does not require proof that the plaintiff would have no claim 'but for' the contacts, or that the contacts were a 'proximate cause' of the liability." *Id.* at 52-53 (quoting *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 584 (Tex. 2007)). Rather, the Texas Supreme Court found *amici* were subject to specific jurisdiction based upon "additional conduct" in the forum state

"beyond the particular business transaction at issue" (*i.e.*, the alleged defamatory newscasts that gave rise to the lawsuit), including a few sporadic and unrelated business trips made by one of the defendants, former office space, and general advertising efforts in southern Texas. Like its counterpart in California, therefore, the Texas Supreme Court mixed and matched suit-related and suit-unrelated conduct, blurring the jurisdictional inquiry beyond recognition. *Amici*'s case demonstrates that a substantial-connection approach unmoored to causation principles undermines the Due Process Clause's goals of consistent and predictable jurisdictional results.

## ARGUMENT

### I. THE COURT SHOULD ADOPT A CAUSATION STANDARD OF SPECIFIC JURISDICTION AND REVERSE THE DECISION BELOW

#### A. The Court Should Adopt A Causation Requirement To Separate Specific From General Jurisdiction And Promote Predictability In Jurisdictional Results

The requirement of a causal connection is an indispensable element of the specific-jurisdiction inquiry, separating suit-related contacts from suit-unrelated contacts. To ensure predictability and fairness in jurisdictional outcomes, the Court should hold that specific jurisdiction requires a showing of a causal connection between the plaintiff's cause of action and the defendant's forum-state conduct.

1. This Court has explained that, "[i]n contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). The specific-

jurisdiction inquiry thus "'focuses on "the relationship among the defendant, the forum, and the litigation."'" *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)). In *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), this Court recognized that, as it has "increasingly trained on the relationship among the defendant, the forum, and the litigation, *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme." *Id.* at 758 (citation and footnote omitted).

The specific-jurisdiction test has two core components. First, a defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State" or purposefully directed activities toward the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Second, specific jurisdiction requires that the controversy be "related to or 'arise[] out of' a defendant's contacts with the forum," *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) – which is often referred to as the "nexus" or "relatedness" element of the specific-jurisdiction inquiry.[3]

**2.** As this Court has explained, "[f]or a State to exercise jurisdiction consistent with due process, the defendant's *suit-related conduct* must create a substantial connection with the forum State." *Walden*, 134 S. Ct. at 1121 (emphasis added). The "nexus" or "relatedness" element is the key to policing this distinction between suit-related and suit-unrelated conduct. While the purposeful-availment prong simply

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[3] If both of those requirements are met, courts then must consider whether the exercise of personal jurisdiction comports with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

asks whether the defendant deliberately conducted business in the forum state, the nexus element is the "divining rod that separates specific jurisdiction cases from general jurisdiction cases," *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 714 (1st Cir. 1996), and ensures that personal jurisdiction in the forum is "reasonably foreseeable," *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 322 (3d Cir. 2007).

In light of these principles, nine federal courts of appeals have held that, to show a specific-jurisdiction nexus, there must be some causal connection between the plaintiff's legal claim and the defendant's forum-state conduct. *See TV Azteca* Cert. Pet. 13-16 & nn.3-5.[4] And nine state courts of last resort – or about half to squarely consider the issue – have reached the same conclusion. *See id.* These courts have recognized that only a causation-based nexus test serves the "basic function" of suit-related specific jurisdiction. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990) (requirement of some causation "is consistent with the basic function of the 'arising out of' requirement – it preserves the essen-

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[4] Among federal circuits, only the Second and Federal Circuits arguably have embraced a substantial-connection test rather than a causation-based rule. *See Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (adopting sliding-scale approach under which the nexus requirement can be loosened for defendants with "more substantial" overall ties to the forum). Even in the Second Circuit, however, more recent district court decisions have stated that causation is required. *See Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 98 (S.D.N.Y. 2015) (stating that, under Second Circuit law, defendant's contacts must at minimum be the "'but for' cause of the plaintiff's injury"). The Federal Circuit has stated in *dicta* that its nexus test is "far more permissive than either the 'proximate cause' or the 'but for' analyses." *Avocent Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1337 (Fed. Cir. 2008).

tial distinction between general and specific jurisdiction"), *rev'd on other grounds*, 499 U.S. 585 (1991).

Without a requirement of causation, lower courts applying the "substantial connection" rule will remain free to shoehorn into the specific-jurisdiction analysis suit-unrelated contacts, such as general business, advertising, and sales activities in the forum state. *See Goodyear*, 564 U.S. at 927 (reversing North Carolina Supreme Court where personal-jurisdiction analysis "elided the essential difference between case-specific and all-purpose (general) jurisdiction"); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (noting that "substantial connection" test "inappropriately blurs the distinction between specific and general personal jurisdiction" and "improperly conflates these two analytically distinct approaches to jurisdiction"); Lisa Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 Ind. L. Rev. 343, 366 (2005) (noting substantial-connection test has "inherent tendency to dilute the requirements of both specific and general personal jurisdiction").

*Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C. 2000), illustrates the fundamental shortcomings of the substantial-connection test. There, the plaintiff slipped and fell on a piece of okra at one of the defendant's Maryland grocery stores. *Id.* at 323. A divided D.C. Court of Appeals held that the grocer was subject to specific jurisdiction in the District because it regularly advertised in *The Washington Post*, even though there was no evidence that the plaintiff saw or acted on those advertisements. *See id.* at 338 (Schwelb, J., dissenting). The court majority explained that, because the defendant "advertis[ed] extensively and over a substantial period of time in

the District's major circulation newspaper, Shoppers could be sued in the District on a claim similar to that filed by Ms. Moreno," even if Ms. Moreno's particular injuries did not result from the advertising. *Id.* at 336. That approach is nothing more than watered-down general jurisdiction under a new name. The grocery chain's advertising in *The Washington Post* had nothing to do with whether it negligently left okra in its aisles and caused the plaintiff's slip-and-fall. As *Moreno* demonstrates, the non-causation "substantial connection" line of reasoning is fundamentally at odds with *Walden*'s instruction that, under specific as opposed to general jurisdiction, "the defendant's suit-related conduct must create a substantial connection with the forum State." 134 S. Ct. at 1121.

**3.** The causal-connection rule of specific jurisdiction also would promote the core purposes of predictability and fair notice underlying due process limitations on the exercise of personal jurisdiction. The "Due Process Clause is supposed to bring 'a degree of predictability to the legal system.' It should allow out-of-state residents to 'structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Sandy Lane Hotel*, 496 F.3d at 321 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Due process thus requires that defendants have "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King*, 471 U.S. at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in the judgment)) (alteration in original).

The majority of courts, here again, have recognized the importance of causation in ensuring predictable results in applying the doctrine of specific jurisdiction. A causation requirement ensures that specific jurisdiction is confined to cases that arise as the direct and foreseeable result from the out-of-state defendant's forum-state activities. *See Sandy Lane Hotel*, 496 F.3d at 321 (without causation requirement, nexus inquiry becomes "freewheeling totality-of-the-circumstances" analysis and, "when the only rule is that each case is different, then in no case can the result safely be predicted"); *see also* Victor N. Metallo, *"Arise Out of" or "Related to": Textualism and Understanding Precedent*, 17 Wash. & Lee J. Civil Rts. & Soc. Just. 415, 443 (2011) ("a test that does not confine contacts to two discernable spheres fails to place defendants on notice of where they stand" and thus prevents parties from "control[ling] their jurisdictional exposure").

### B. The Court Should Reverse The Decision Below, Which Eschewed Causation And Blended Principles Of Specific And General Jurisdiction

In *Bristol-Myers Squibb*, 678 plaintiffs – including 592 out-of-state plaintiffs – brought a products-defect suit in California state court, alleging they suffered harm when they took the drug Plavix (which is used to inhibit blood clotting). Pet. App. 1a-3a. The defendant Bristol-Myers Squibb manufactured and marketed Plavix. *Id.* Although Bristol-Myers Squibb had five research and laboratory facilities and employees in California, it did not design or manufacture Plavix there. *Id.* at 5a. Nor did Bristol-Myers Squibb prepare the marketing materials for the drug in the State. *Id.* As for the out-of-state plaintiffs, they were not prescribed with or treated

for Plavix in California; rather, they suffered their alleged injuries elsewhere. *Id.* at 4a; *id.* at 46a-47a (Werdegar, J., dissenting).

In determining whether specific jurisdiction existed over Bristol-Myers Squibb with respect to the out-of-state plaintiffs' claims, the California Supreme Court reiterated and applied its longstanding "substantial connection" test. *Id.* at 21a-22a. Under that test, "the defendant's activities in the forum state need not be either the proximate cause or the 'but for' cause of the plaintiff's injuries." *Id.* at 22a. Rather, the "more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim"; thus, the plaintiff's claim "need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction." *Id.*

Applying this non-causation-based standard, the California Supreme Court found specific jurisdiction existed based upon Bristol-Myers Squibb's nationwide sales and marketing efforts and general business ties with California, such as its five research and laboratory facilities in the State. *Id.* at 24a-25a, 28a-29a. Tellingly, the court below acknowledged that there was "no claim that Plavix itself was designed or developed in these [California] facilities." *Id.* at 29a. Those suit-unrelated forum-state facilities therefore should have been immaterial, but instead the decision below cited the state offices as creating "an additional connection" that was somehow relevant to the specific-jurisdiction nexus analysis. *Id.*; *compare with Daimler*, 134 S. Ct. at 757 (contacts that bore "no apparent relationship to the accident that gave rise to the suit" are properly considered under general jurisdiction, not specific jurisdiction).

In sum, the California Supreme Court's "substantial connection" reasoning fails this Court's basic test of specific jurisdiction. The Court should reverse the decision below and reiterate that specific jurisdiction must be "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear*, 564 U.S. at 919; *see Walden*, 134 S. Ct. at 1121 (specific-jurisdiction inquiry "focuses on 'the relationship among the defendant, the forum, and the litigation'") (quoting *Keeton*, 465 U.S. at 775).

## II. THE SUBSTANTIAL-CONNECTION TEST APPLIED BY THE TEXAS SUPREME COURT IS SIMILARLY UNPREDICTABLE AND IMPROPERLY BLURS JURISDICTIONAL LINES

### A. The Substantial-Connection Test Is Problematic In A Variety Of Contexts

Although *Bristol-Myers Squibb* concerns a nationwide products-liability action brought in California state court, a stubborn minority of state courts of last resort continues to apply the substantial-connection test across a wide variety of legal contexts.

The Texas Supreme Court applies a "substantial connection" test that similarly disavows causation principles. The Texas test provides that, for purposes of specific jurisdiction, a plaintiff's claim "arises from or relates to" the defendant's forum-state conduct when there is a "'substantial connection between [the defendant's forum-state] contacts and the operative facts of the litigation.'" *TV Azteca, S.A.B. de C.V. v. Ruiz*, 490 S.W.3d 29, 52 (Tex. 2016) (quoting *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 585 (Tex. 2007)), *pet. for cert. pending*, No. 16-481 (U.S. filed Oct. 7, 2016). Like its counterpart in California,

the Texas Supreme Court's standard explicitly rejects any requirement of a causal nexus: "Th[e] 'substantial connection' standard does not require proof that the plaintiff would have no claim 'but for' the contacts, or that the contacts were a 'proximate cause' of the liability." *Id.* at 52-53 (quoting *Moki Mac*, 221 S.W.3d at 584).[5]

### B. The Texas Supreme Court's Decision In *TV Azteca* Demonstrates The Substantial-Connection Test Is Unpredictable And Unworkable

In *TV Azteca*, the Texas Supreme Court applied its "substantial connection" test in an extreme decision that illustrates how a non-causation-based rule inherently conflates general and specific jurisdiction and undermines the core policies of the Due Process Clause.

1. The plaintiff in *TV Azteca* is Gloria Ruiz, a Mexican singer "sometimes referred to as 'Mexico's Madonna.'" 490 S.W.3d at 35. In the late 1990s, at the height of her fame and fortune, Ms. Trevi was criminally charged with kidnapping and sexual assault

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[5] The Texas Supreme Court has declined to adopt the "sliding scale" approach used by the California courts, *see Moki Mac*, 221 S.W.3d at 583, but that merely illustrates that there is disagreement even among courts attempting to apply the "amorphous" substantial-connection rule. Brief of Law Professors as *Amici Curiae* in Support of Petitioners at 2, *TV Azteca, S.A.B. de C.V. v. Ruiz*, No. 16-481 (U.S. filed Nov. 14, 2016) ("[T]here is disarray even among courts applying the 'substantial connection' test, reflecting the difficulty in applying such a vague and amorphous standard."). Critically, both the Texas and the California courts agree that the "substantial connection" rule does not require any showing of causation. That feature is the dispositive one under the question presented in *Bristol-Myers Squibb*.

for allegedly luring underage girls into sexual relationships with her manager and then-boyfriend. *Id.* Ms. Trevi was eventually arrested and spent time in Brazilian and Mexican prisons, before a Mexican judge dismissed the charges against her in 2004. *Id.*

*Amici* – three Mexican nationals in the broadcasting industry – are the defendants in Ms. Trevi's defamation suit. TV Azteca is a Mexican national network that produces and airs the popular entertainment news program *Ventaneando* hosted by senior anchor petitioner Patricia Chapoy. *Id.* TV Azteca and its broadcasting partner, Publimax, are Mexican corporations with no offices, employees, or agents in the United States; Ms. Chapoy is a Mexican citizen who has never resided in Texas or been party to a lawsuit in the United States. *Id.*

In 2009, on the 10-year anniversary of the criminal charges against Ms. Trevi, *Ventaneando* produced a series of retrospective reports regarding Ms. Trevi's saga. Those reports were made in Mexico, by Mexican journalists, for Mexican viewers, relying upon Mexican sources, and they concerned the activities of Mexican citizens (including Ms. Trevi) in Mexico and Brazil. *Id.* at 47-48. None of *amici*, or anyone acting on their behalf, traveled to Texas to report, prepare, or film the programs. *See TV Azteca, S.A.B. de C.V. v. Ruiz*, 494 S.W.3d 109, 118 (Tex. App. 2014), *aff'd*, 490 S.W.3d 29 (Tex. 2016), *pet. for cert. pending*, No. 16-481 (U.S. filed Oct. 7, 2016). Nor did *amici* intentionally broadcast the alleged defamatory reports into Texas. Rather, because of "involuntary spillover" inherent in any broadcast signal, some over-the-air transmissions from the 2009 broadcasts bled into the United States and were received by viewers along the south Texas border. 490 S.W.3d at 49.

2. Nevertheless, Ms. Trevi sued *amici* for defamation in Texas state court, not Mexico. In evaluating whether *amici* were subject to specific jurisdiction in Texas, the Texas Supreme Court applied its "substantial connection" test and eschewed any causation-based analysis. The court found specific jurisdiction existed over *amici* based upon an improper amalgamation of general business and sales contacts with Texas, notwithstanding that those contacts are wholly unrelated to whether the 2009 television broadcasts defamed Ms. Trevi.

Notably, the Texas Supreme Court candidly acknowledged that "[t]he subject matter of the allegedly defamatory broadcasts is *completely unrelated to Texas*" because the events in question "occurred outside of and [were] completely unrelated to Texas." 490 S.W.3d at 47 (emphasis added). That should have ended the inquiry, but did not, because the Texas Supreme Court's substantial-connection rule permitted jurisdiction to be predicated on "conduct beyond the *particular business transaction at issue*" in the case. *Id.* at 54 (emphasis added). The court found *amici's* "additional conduct" in Texas justified the exercise of specific jurisdiction, based upon a smattering of sporadic and suit-unrelated business ties between *amici* and the forum state. In particular, the court cited three prior instances in which two of the *amici* were physically present in Texas unrelated to the broadcasts in question[6] and other general sales

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[6] Those contacts were: (1) between 2005 and 2009, Publimax had a business office in South Texas; (2) in 2006 or 2007, Publimax "sent or hired an employee to work in Texas" to explore expanding its operations through cable distribution; and (3) Ms. Chapoy made one trip to Laredo to promote a book (unrelated to Ms. Trevi) and a few years later made another trip to Dallas to host a live broadcast of a separate episode of

and "promotional" efforts to generate advertising revenue from Texas businesses. *Id.* at 49-51, 54-55.[7]

Tellingly, the Texas decision omits any discussion of what should be the heart of the specific-jurisdiction inquiry: whether *amici*'s forum-state conduct gave rise to Ms. Trevi's defamation claim. Indeed, the only time the Texas decision even mentions causation is when it disavows that concept as a prerequisite to specific jurisdiction. *Id.* at 52-53. As with *Bristol-Myers Squibb*, the erroneous result in *TV Azteca* shows that a substantial-connection test untethered to causation principles will undermine the core principle that specific personal jurisdiction must be based on a defendant's "*suit-related conduct*." *Walden*, 134 S. Ct. at 1121 (emphasis added).

## CONCLUSION

The judgment of the court of appeals should be reversed.

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*Ventaneando* (which was also unrelated to Ms. Trevi). 490 S.W.3d at 49-51.

[7] The Texas Supreme Court also conflated the Texas contacts of the three *amici* rather than assessing them individually – another error in its analysis. *See Calder v. Jones*, 465 U.S. 783, 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually.").

Respectfully submitted,

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March 9, 2017

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAR - 8 2016
OFFICE OF THE CLERK

No. 16-466

IN THE

# Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

*Petitioner,*

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

*Respondents.*

**On Writ of Certiorari to the California Supreme Court**

## BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

The Due Process Clause permits a state court to exercise specific jurisdiction over a defendant only when the plaintiff's claims "arise out of or relate to" the defendant's forum activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted). The question presented is:

Whether a plaintiff's claims arise out of or relate to a defendant's forum activities when there is no causal link between the defendant's forum contacts and the plaintiff's claims—that is, where the plaintiff's claims would be exactly the same even if the defendant had no forum contacts.

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## INTERESTS OF *AMICI CURIAE*

Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared frequently in this Court in cases involving personal jurisdiction issues, to support defendants seeking to avoid being subject to a court's coercive powers when assertion of jurisdiction does not comply with traditional notions of fair play and substantial justice. *See, e.g., BNSF Railway Co. v. Tyrrell, cert. granted,* ___ U.S. ___, 2017 WL 125672 (Jan. 13, 2017); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Novo Nordisk A/S v. Lukas-Werner, cert. denied*, 134 S. Ct. 423 (2013). WLF also filed briefs in support of Petitioner in the California Supreme Court and at the certiorari petition stage.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions, including in *BNSF Railway Co. v. Tyrrell.*

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing; letters of consent have been lodged with the Court.

In its seminal decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the Court made clear that the courts of a State lack personal jurisdiction over a corporate defendant unless its activities within the State give rise to the claims being asserted or unless the corporation is "at home" within the forum State. *Daimler* further clarified that a corporation, even one that conducts substantial business in all 50 States, should be deemed "at home" in no more than one or two of the States. *Amici* are concerned that the rationale of the California Supreme Court, unless overturned by this Court, would essentially negate *Daimler* as an effective check on state-court jurisdiction over out-of-state corporate defendants. *Amici* are further concerned that the decision below deprives businesses of adequate means to structure their conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

## STATEMENT OF THE CASE

Like many corporations that sell products nationwide, Petitioner Bristol-Myers Squibb Co. ("BMS") sells a large number of products in California. For example, BMS's Plavix sales in California between 2006 and 2012 totaled nearly $1 billion. This case addresses whether those substantial sales are sufficient to justify California's exercise of jurisdiction over claims filed by nonresidents who allege that their purchase and use of Plavix—and their alleged injury from such use—all occurred outside California.

A State's exercise of personal jurisdiction over a corporation based on business activity within the State

that is not directly related to events giving rise to the litigation is often referred to as an exercise of "general jurisdiction." *Daimler* made clear that a State may not exercise general jurisdiction over a corporation when, as here, the corporation is neither incorporated in nor has its principal place of business within the State (nor is otherwise effectively "at home" in the State), even when the corporation has substantial sales within the State. This case addresses whether nonresidents may nonetheless invoke the California courts' personal jurisdiction over such a corporation by citing those very same substantial sales as the basis for "specific jurisdiction."

These products liability actions involve allegations that consumers from across the nation suffered injuries after taking Plavix, a drug approved by the Food and Drug Administration for use in preventing dangerous blood clots. A total of 661 plaintiffs—86 California residents and 575 nonresidents—joined together to file eight separate complaints against BMS in March 2012 in San Francisco Superior Court.[2] The 575 nonresident plaintiffs claim no contacts with BMS's California activities or with California generally. Moreover, although BMS derives substantial revenue from California sales, those sales represent but a small

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[2] The decision by plaintiffs' lawyers to file eight separate complaints (each with fewer than 100 plaintiffs) was not coincidental. Had any of the complaints included 100 or more plaintiffs, BMS's right to remove that complaint to federal court under the Class Action Fairness Act (CAFA) would have been beyond question. *See* 28 U.S.C. § 1332(d)(11)(B)(i) (authorizing removal of a "mass action" in which the monetary claims of "100 or more persons are proposed to be tried jointly.").

fraction of BMS's overall sales, and California is not the State in which BMS is incorporated (Delaware), not the State in which it maintains its principal place of business (New York), and not even one of the States in which Plavix is manufactured.

The California Supreme Court nonetheless held that California could maintain personal jurisdiction over BMS with respect to the claims not only of the 86 California residents (an issue that BMS does not contest) but also with respect to the 575 nonresident plaintiffs (the "Respondents").

When the case first came before the California Court of Appeal, it summarily denied BMS's writ petition (seeking review of the superior court's conclusion that it could exercise general jurisdiction over BMS based on the company's substantial business activity in California). Following the 2014 *Daimler* decision, the California Supreme Court directed the appeals court to address the merits of BMS's petition. It did so and concluded that although *Daimler* precluded assertion of *general* jurisdiction over BMS with respect to the claims of the nonresident defendants, California courts could still assert *specific* jurisdiction over BMS. Pet. App. 91a-146a.

A sharply divided California Supreme Court affirmed. Pet. App. 1a-90a. The four-justice majority recognized that the Due Process Clause bars California courts from exercising specific jurisdiction over BMS unless Respondents can demonstrate that their claims "arise out of or are related to [BMS's] forum-related activities." Pet. App. 20a-21a. While it did not assert that the claims of Respondents "arise out of" any of

BMS's California-based activities, the majority concluded that BMS's activities were sufficiently "related to" those claims to warrant the exercise of personal jurisdiction. *Id.* at 25a-35a.

The majority held that, in order to satisfy the "related to" requirement, "the defendant's activities in the forum state need not be either the proximate cause or the 'but for' cause of the plaintiff's injuries." *Id.* at 22a. Instead, in accord with prior California Supreme Court case law, the majority held that it is sufficient to demonstrate "a substantial nexus or connection between the defendant's forum activities and the plaintiff's claims." *Id.* at 21a. It elaborated:

> Under the substantial connection test, the intensity of forum contacts and the connection of the claim to those contacts are inversely related. The more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim. Thus, a claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Indeed, only when the operative facts of the controversy are not related to the defendant's contact with the state can it be said that the cause of action does not arise from that contact.

*Id.* at 22a (citations omitted).

The majority acknowledged that Respondents were not injured by Plavix in California, were not treated in California, were not prescribed Plavix by California doctors, and did not have their prescriptions filled by California pharmacists. It further acknowledged that BMS neither developed nor manufactured Plavix in California, and that the distribution chain for the Plavix supplied to Respondents did not pass through California. The majority based its "substantial connection" finding on evidence that BMS: (1) extensively marketed Plavix to California residents as part of a nationwide marketing program; (2) contracted with McKesson Corp. (a California corporation) to distribute Plavix and hired several hundred salespersons within the State; and (3) maintains facilities in California that research and develop other BMS products (but not Plavix). *Id.* at 32a.

Justice Werdegar, joined by Justices Chin and Corrigan, dissented. Pet. App. 46a-87a. She concluded, "[*T*]*he record contains no evidence connecting the Plavix taken by any of the nonresident plaintiffs to California.*" *Id.* at 47a (emphasis in original). She argued that the majority's conclusion that California could exercise jurisdiction over BMS in connection with Respondents' claims was based on a specific-jurisdiction standard that conflicts with the standard adopted by this Court and numerous other appellate courts. *Id.* at 51a-77a. She warned that the decision interferes with rational business planning by undermining the ability of businesses to predict the types of litigation to which they expose themselves when they decide to undertake activities within a State. *Id.* at 79a-80a.

## SUMMARY OF ARGUMENT

As the Court has repeatedly reminded, the Fourteenth Amendment's Due Process Clause imposes strict limits on the authority of a state court to exercise personal jurisdiction over out-of-state defendants. *See, e.g., J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter."). Those limitations serve both to protect litigants from inconvenient or distant litigation and to recognize limits on the sovereignty of each State with respect to affairs arising in other States. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980). The decision below threatens to obliterate those limitations by subjecting out-of-state defendants to the jurisdiction of California courts based on nonresidents' claims lacking any connection to California.

The Due Process Clause permits a state court to exercise specific jurisdiction over a defendant only when the plaintiff's claims "arise out of or relate to" the defendant's forum activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). The California Supreme Court employs a "substantial nexus or connection" test, under which the "arise out of or relate to" requirement is deemed satisfied so long as the defendant's forum contacts are sufficiently intense, even when those contacts are largely unrelated to the plaintiffs's claims. In applying its "substantial nexus or connection" test here, the court explicitly disclaimed any requirement that the defendant's activities in the forum State be the "proximate" cause, or even the "but for" cause, of the plaintiffs' injuries. Pet. App. 22a.

That test cannot be squared with this Court's personal-jurisdiction decisions. The Court's decisions have never suggested that the exercise of specific jurisdiction is appropriate when, as here, the only relationship between the plaintiffs' claims and the defendant's forum activities is a similarity of subject matter, and when none of those forum activities played any role in bringing about the plaintiffs' alleged injuries. As the Court stated categorically in a recent specific-jurisdiction case, for a court to exercise personal jurisdiction consistent with due process, "the defendant's *suit-related conduct* must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (emphasis added). The connection cannot be deemed "substantial" unless the defendant's forum activities are at least a but-for cause of the plaintiff's injuries.

Respondents have not pointed to any "suit-related conduct" by BMS that is connected to California. Indeed, if the conduct to which Respondents point—principally, BMS's substantial general business activity within California—suffices to create specific jurisdiction with respect to the nonresident Respondents' claims, then the due-process limitations imposed by *Daimler* on the scope of general jurisdiction will be rendered a dead letter.

To assist with the due process analysis, the Court has identified two strands of personal jurisdiction: general jurisdiction (assertions of jurisdiction in a State in which the defendant is "at home" and thus answerable to any and all claims) and specific jurisdiction (assertions of jurisdiction in a State based on a close relationship between the defendant's

in-state activities and the claims asserted). *Daimler*, 134 S. Ct. at 754. But the rationale underlying both strands is identical: due process permits a defendant to be haled into a court only if doing so is consistent with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

*Daimler* held that subjecting a corporation to the general jurisdiction of a State's courts simply because it "engages in a substantial, continuous, and systematic course of business" within the State violates due process because it offends traditional notions of fair play and substantial justice. 134 S. Ct. at 761. Subjecting that same corporation to personal jurisdiction does not cease to offend traditional notions of fair play and substantial justice simply because the state court has re-labeled its action as an assertion of "specific jurisdiction" and (employing a "sliding scale" standard) has pointed to an insignificant relationship between the defendant's in-state activities and the claims asserted. Unless *Daimler*'s limits on subjecting a corporation to jurisdiction wherever it is "doing business" apply to both strands of personal jurisdiction, the important constitutional protections afforded out-of-state corporate defendants by *Daimler* will be meaningless.

Adopting the due-process requirement urged by BMS—a showing of a causal link between the defendant's forum contacts and the plaintiffs' claims—has the added virtue of simplicity. This Court has repeatedly advocated the adoption of clear jurisdictional rules that can be applied consistently. The sliding-scale approach adopted by the California

Supreme Court is unduly complicated and provides corporations with little if any guidance regarding when their activities within a State will subject them to the jurisdiction of that State's courts.

## ARGUMENT

### I. CALIFORNIA COURTS MAY NOT EXERCISE PERSONAL JURISDICTION OVER BMS IN THE ABSENCE OF EVIDENCE THAT BMS'S CALIFORNIA-BASED ACTIVITIES CAUSED INJURY TO RESPONDENTS

As this Court has long recognized, the Due Process Clause of the Fourteenth Amendment limits the authority of state courts to exercise personal jurisdiction over nonresident defendants that do not voluntarily consent to jurisdiction. *See, e.g.*, *J. McIntyre Machinery*, 564 U.S. at 881 (plurality) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter."). A state court may exercise personal jurisdiction over a nonresident defendant only if the plaintiff can demonstrate a relationship among the defendant, the forum state, *and* the litigation. *International Shoe*, 326 U.S. at 316. This requirement serves two important functions: it protects the defendant from being required to defend a lawsuit in an inconvenient forum and it "acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292.

The Court has consistently held that a state court may not exercise personal jurisdiction over an out-of-state defendant simply because the defendant has engaged in continuous and systematic activities within the State. Rather, personal jurisdiction also requires a showing that the defendant's activities are sufficiently connected to the claim. *See, e.g., Daimler*, 134 S. Ct. at 757 ("a corporation's 'continuous activity of some sort within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity'") (quoting *International Shoe*, 326 U.S. at 318); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) ("the central concern of the inquiry into personal jurisdiction" is "the relationship among the defendant, the forum, *and the litigation*") (emphasis added). As *Daimler* explained, personal jurisdiction may not be exercised over nonresident defendants based on claims "having nothing to do with anything that occurred or had its principal impact in" the forum state. *Daimler*, 134 S. Ct. at 762.

A defendant is generally required to answer any and all claims asserted in its "home" jurisdiction, even if the claim bears no relationship to the jurisdiction. The Court refers to an assertion of personal jurisdiction where the defendant is "at home" as an exercise of "general jurisdiction." *Goodyear*, 564 U.S. at 919. *Daimler* made plain, however, that—except in very unusual circumstances—an assertion of general jurisdiction over a corporation can be sustained in only two places: the State in which a corporation maintains its principal place of business and the State of incorporation. 134 S. Ct. at 760. In *Daimler*, the Court rejected the plaintiffs' request that it approve "the

exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business," characterizing the plaintiffs' proposed formulation as "too grasping." *Id.* at 761.

It is undisputed that BMS is not subject to general jurisdiction in California. It is not incorporated in California, nor does it maintain its principal place of business in the State. Thus, for the California courts to properly exercise personal jurisdiction over BMS with respect to each of the tort claims asserted by Respondents, it must do so on the basis of "specific jurisdiction"—that is, a showing that each claim "arises out of or relates to the defendant's contacts with the forum." *Id.* at 754.

### A. Respondents' Claims Do Not Arise out of or Relate to BMS's Contacts with California

In concluding that Respondents' claims "arise out of or relate to" BMS's contacts with California, the California Supreme Court principally relied on evidence that BMS markets Plavix on a nationwide basis and that its California marketing efforts are similar to the allegedly misleading Plavix marketing efforts undertaken by BMS in each of Respondents' home States. Pet. App. 28a. The court concluded that Respondents' claims:

> [A]re based on the same allegedly defective product and the assertedly misleading marketing and promotion of

> that product [as asserted by other, California-based plaintiffs], which allegedly caused injuries in and outside the state. Thus, the nonresident plaintiffs' claims bear a substantial connection with BMS's contacts in California.

*Ibid.*

In other words, as far as the California Supreme Court is concerned, the requisite relationship among BMS, the forum, and the litigation can be established even when, as here, "the nonresident plaintiffs' claims would be exactly the same if BMS had no contact whatever with California." *Id.* at 29a. The court rejected BMS's argument that the existence of a nationwide Plavix marketing campaign was insufficient "to establish relatedness for purposes of minimum contacts," stating that that argument "rest[ed] on the invalid assumption that BMS's forum contacts must bear some substantive legal relevance to the nonresident plaintiffs' claims." *Id.* at 30a.

Yet, the assumption that the court deemed "invalid"—that the defendant's forum contacts must "bear some legal relevance" to the plaintiffs' claims in order to satisfy the "arise out of or relate to" requirement—is an assumption that has underpinned every one of this Court's specific-jurisdiction decisions.

Thus, for example, in determining whether California courts could exercise specific jurisdiction over Florida residents in connection with a libel claim

asserted by a California resident, the Court focused its inquiry solely on forum contacts that were legally relevant to the libel claim. *Calder v. Jones*, 465 U.S. 783 (1984). The defendants were the writer and editor of an article that was widely circulated by the *National Enquirer* in California. Although the defendants were responsible for numerous other articles that were circulated in California, the only forum contacts upon which the Court relied were those related to the article that allegedly defamed the plaintiff: "petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis." *Id.* at 790. But under the California Supreme Court's expansive understanding of specific jurisdiction, the defendants' authorship of articles directed at *other* California residents would have been sufficient by itself to satisfy due-process requirements.

Similarly, in *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), the Court determined that the defendant's numerous contacts with the forum State (Texas) were insufficient to permit Texas to exercise personal jurisdiction because those contacts did not arise out of or relate to the plaintiffs' claims (which involved injuries arising from a helicopter crash in Peru). Yet the decision almost surely would have come out the other way under the specific-jurisdiction standard adopted by the California Supreme Court.

Although the ill-fated helicopter services were not provided in Texas, the defendant engaged in numerous helicopter-related activities within the State,

including: (1) purchase of its helicopters and spare parts within Texas; (2) sending its pilots to Texas for flight training; (3) regularly sending employees to Texas to consult with the helicopter manufacturer; (4) sending its chief executive officer to Houston to negotiate the helicopter service contract with the plaintiffs' employer; and (5) accepting checks written by the Texas-based employer and drawn on a Texas bank. None of those Texas-based activities had any "legal relevance" to the plaintiffs' claims that the defendant operated its helicopter in Peru in a negligent manner. But because the California Supreme Court does not deem "legal relevance" a prerequisite for establishing specific jurisdiction under its "significant nexus or connection" test, those numerous forum contacts (all of which related to the defendant's helicopter operations) seemingly would have been more than sufficient for the California Supreme Court to uphold personal jurisdiction.

Most recently, the Court held that a Nevada court lacked specific jurisdiction over claims against a DEA agent arising from his seizure of cash at the Atlanta airport from a Nevada resident about to board a flight home to Nevada. *Walden v. Fiore*, 134 S. Ct. 1115 (2014). The Court conceded that the injury caused by the defendant's allegedly tortious conduct occurred in Nevada by virtue of the plaintiff's Nevada residency and that the defendant was well aware of the plaintiff's residency. *Id.* at 1125. But the Court concluded that that evidence was insufficient to establish that the plaintiff's claims "arose out of or were related to" relevant forum contacts. It explained that "[f]or a State to exercise jurisdiction consistent

with due process," it is the defendant's "suit-related conduct" that must create a "substantial connection" with the forum State, *id.* at 1121, and the happenstance of the plaintiff's residency was unrelated to the defendant's allegedly tortious conduct in Atlanta.

In other words, it made no difference whether the DEA agent might have had numerous other connections with Nevada that were not "suit related." In the absence of evidence that *the defendant's conduct toward the plaintiff and his claim* had a substantial connection with Nevada, the Due Process Clause prohibited a Nevada court from exercising personal jurisdiction. The decision below, which based a finding of specific jurisdiction on BMS forum contacts that were not "suit related," cannot be reconciled with *Walden.*

As Justice Werdegar explained in her dissent below:

> Of the post-*International Shoe* decisions in which the high court actually found a factual basis for specific jurisdiction, each featured a direct link between forum activities and the litigation. (See *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 479-80 [specific jurisdiction in Florida courts proper where franchise dispute "grew directly out of" contract formed between Florida franchisor and Michigan franchisee, whose breach caused "caused foreseeable injuries to the corporation in Florida."])

Pet. App. 53a-54a.

The Court has not specified precisely how close the connection must be before the plaintiff's claims can be deemed to "grow out of" the defendant's forum-related activities. But its case law indicates that those contacts must, at the very least, be a but-for cause of the plaintiff's injury. In every case in which the Court has sustained specific jurisdiction, a causal connection existed between the defendant's forum-related activities and the claimed injury. The Court has prohibited the exercise of personal jurisdiction in cases in which there was no evidence that the forum-related activities were causally related to the injury. *See, e.g.*, *Helicopteros*, 460 U.S. at 415-19 (Defendant had numerous contacts with Texas that were not causally related to plaintiffs' injuries in Peru; those contacts were insufficient to sustain personal jurisdiction in Texas courts.); *Goodyear*, 564 U.S. at 926-27 (Defendants sold tires in North Carolina, and a defect in other tires manufactured and sold in Europe (the very same brand) caused injury to plaintiffs' decedents in Paris; defendants' North Carolina sales were insufficient to sustain specific jurisdiction in North Carolina.). Because the California Supreme Court explicitly held that the nonresident Respondents were not required to establish a causal connection (between BMS's California activities and their injuries) in order to sustain specific jurisdiction over BMS, the decision below must be reversed.

### B. The California Supreme Court Relied on Inappropriate Factors in Determining that BMS's California Contacts Were Sufficiently Related to Respondents' Claims

BMS asserted below that the factual similarity between the claims of California residents (over whose claims, all agree, the California courts are entitled to exercise jurisdiction) and those of the nonresident Respondents did not in and of itself justify California's exercise of personal jurisdiction over the claims of the nonresident Respondents. The California Supreme Court rejected that assertion, concluding that the existence of a nationwide marketing campaign for Plavix demonstrated that the claims of the nonresident and resident Respondents were closely intertwined and not merely "similar":

> [BMS's] characterization ignores the uncontested fact that all the plaintiffs' claims arise out of BMS's nationwide marketing and distribution of Plavix. The claims are based not on "similar" conduct, as our dissenting colleagues contend, but instead on a single, coordinated, nationwide course of conduct directed out of BMS's New York headquarters and New Jersey operations center and implemented by distributors and salespersons across the country.

Pet. App. 29a-30a.

But focusing on the allegedly coordinated nature of the nationwide marketing campaign does nothing to establish a causal connection between BMS's California-based activities and the injuries allegedly suffered by the nonresident Respondents. As the court recognized, the marketing campaign was coordinated from New York and New Jersey, not California. The campaign may have been "implemented by distributors and salespersons across the country," but there is no allegation that any of the distributors and salespersons who played a role in marketing Plavix to the nonresident Respondents were located in California. In the absence of evidence that the marketing of Plavix to the nonresident Respondents involved any California-based activity, the allegedly coordinated nature of that marketing is a red herring; it provides no support for an assertion that the nonresident Respondents' claims are connected to or arise out of BMS's activities in California.

Nor are Respondents' claims strengthened by the allegation that "BMS maintains research and laboratory facilities in California, and it presumably enjoys the protection of our laws related to those activities." Pet. App. 29a. It is uncontested that none of those facilities has ever conducted any research regarding Plavix. The California Supreme Court nonetheless concluded that the existence of those facilities "provides an additional connection between the nonresident plaintiffs' claims and the company's activities in California." *Ibid.* The Court justified that "substantial nexus and connection" finding on the fact that the complaint includes claims that *other* BMS research facilities located in *other* States were

responsible for the allegedly negligent development and design of Plavix.

That justification—which is based on nothing more than a similarity of function between the California-based facilities and the non-California BMS facilities responsible for BMS's allegedly tortious conduct—well illustrates the essentially limitless nature of California's assertion of personal jurisdiction over nonresident companies that conduct business within the State. It would permit the exercise of personal jurisdiction with respect to virtually all claims against an out-of-state company that engages in a substantial, continuous, and systematic course of business within California (without regard to where the claims may arise), because the in-state activities of such a company are highly likely to parallel the out-of-state activities that give rise to such claims. But *Daimler* unequivocally rejected that broad "formulation" for personal jurisdiction, terming it "unacceptably grasping." 134 S. Ct. at 761.

Nor is it relevant to the "arise out of or relate to" inquiry that Respondents also assert claims against McKesson Corporation, which (as a California corporation) is subject to the general jurisdiction of the California courts. This Court has explained that *International Shoe*'s due process requirements "must be met as to each defendant over whom a state court exercises jurisdiction" and that the assertion of jurisdiction over one defendant based solely on the activities of another defendant "is plainly unconstitutional." *Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980).

The California Supreme Court's reliance on this Court's decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), was misplaced. The California court asserted, "As the high court explicitly declared in *Keeton*, a 'plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of the defendant's contacts.'" Pet. App. at 34a (quoting *Keeton*, 465 U.S. at 780). The court badly misconstrued *Keeton*. Although the plaintiff in that case did not reside in the forum State (New Hampshire), she suffered injuries there. The defendant's allegedly libelous publication was widely circulated in New Hampshire, causing injury to the plaintiff's reputation within the State.

Indeed, *Keeton*'s heavy reliance on the defendant's litigation-related contacts with New Hampshire in upholding the exercise of personal jurisdiction by the New Hampshire court directly undercuts the California Supreme Court's position. *Keeton* quite clearly does not support the claim that exercise of specific jurisdiction is proper even though Respondents "did not suffer any Plavix-related injuries in the State." Pet. App. at 33a-34a.

### C. Interstate Federalism Principles Also Bar Exercise of Personal Jurisdiction over BMS

The California Supreme Court also sought to bolster its specific-jurisdiction holding by arguing that "judicial economy" would be served by permitting the consolidated complaints to proceed in California courts,

rather than requiring the 575 nonresident Respondents to file their factually similar claims in separate States. Pet. App. 41a-44a[3] The court concluded that coordinating all of the claims in one California court would permit common issues to be resolved more efficiently. *Ibid.*

Such efficiency considerations are simply not relevant to the due-process issue before the Court: whether the claims of the nonresident Respondents "arise out of or relate to" BMS's California activities.[4] The Court has never authorized a state court to exercise personal jurisdiction over nonresident defendants in the name of judicial efficiency, if doing so would subject the defendants to claims having little or no connection to the defendant's contacts with the forum. Indeed, the Court has made clear that the U.S. Constitution imposes territorial constraints on the jurisdiction of state courts, and that such constraints do more than simply ensure fairness to an out-of-state defendant. As the Court said in *World-Wide Volkswagen*, constitutional limits on personal jurisdiction also operate "to ensure that the States, through their courts, do not reach out beyond the limits

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[3] Of course, counsel for Respondents could avoid the problem of multiple state-court forums simply by filing all of their lawsuits in either Delaware or New York, the two States in which BMS is "at home" and thus subject to general jurisdiction.

[4] Assertions by counsel for Respondents that their clients' claims should be tried together ring particularly hollow when one considers that they deliberately filed the initial claims in eight separate lawsuits, in an apparent effort to avoid removal to federal court.

imposed on them by their status as coequal sovereigns in a federal system. . . . [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen*, 444 U.S. at 292-93. Those federalism principles impose enforceable limits on a State's authority to project its laws outside of its own boundaries:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its laws to the controversy; even if the forum state is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

*Id.* at 294.

Although recognizing that *International Shoe* marked a departure from the rigid territorial-based rules of personal jurisdiction that prevailed in the late nineteenth and early twentieth centuries, the Court has warned that:

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of

> state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states.

*Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

Thus, while BMS (by virtue of maintaining its principal place of business in New York), is subject to the general jurisdiction of the New York courts, it unequivocally is *not* subject to the exercise of personal jurisdiction by the courts of suburban Connecticut over claims arising outside the State—even though those courts are located only a few miles away from New York and thus could be a relatively convenient location for BMS to litigate claims asserted against the company. Permitting suit in Connecticut in some circumstances might promote efficiency, but it would undercut the Framers' intent that States not be permitted to exceed the limits imposed on them by interstate federalism principles. *World-Wide Volkswagen*, 444 U.S. at 292.

As Judge Werdeger explained in dissent:

> [When] specific jurisdiction [is based] on mere similarity between a corporation's forum activities and those outside the state, ... interstate federalism is perhaps most directly impaired; by taking jurisdiction to adjudicate a dispute arising only from BMS's actions in, for

> example, Texas, and allegedly resulting in injuries only to a Texan, the California courts infringe directly on Texas's sovereign prerogative to determine what liabilities BMS should bear for actions in its borders and injuring its residents.

Pet. App. 83a. Fair play and substantial justice requires that California cease such grasping conduct.

## II. CALIFORNIA MAY NOT AVOID *DAIMLER*'S DUE-PROCESS CONSTRAINTS BY RE-LABELING ITS ACTIONS AS AN ASSERTION OF SPECIFIC JURISDICTION

The California Supreme Court appears to have been led astray by its erroneous belief that it could evade the limits on "general jurisdiction" by taking the test the Court rejected in *Daimler* and repackaging it as a form of "specific jurisdiction." That is incorrect. Regardless of which of the two strands of personal jurisdiction one applies, due process constraints still apply. Due process permits a defendant to be haled into a court only if doing so is consistent with "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. The reasons why subjecting BMS to general jurisdiction in California offends traditional notions of fair play and substantial justice (a point conceded by the California Supreme Court) are very similar to the reasons why BMS is not subject to specific jurisdiction with respect to the claims of the nonresident Respondents.

*Daimler* rejected, as "unacceptably grasping,"

efforts to subject an out-of-state corporation to the general jurisdiction of California courts, despite allegations that it "engage[d] in a substantial, continuous, and systematic course of business" within the State. 134 S. Ct. at 761. "Traditional notions of fair play and substantial justice" permit a State to exercise "all purpose jurisdiction" over a corporation if and only if the corporation's ties with the State are sufficiently extensive that the State can fairly be considered its "home." *Id.* at 760. The Court indicated that, barring exceptional circumstances, a corporation is "at home" only in the State in which it is incorporated and the State in which it maintains its principal place of business.

For identical reasons, a State offends traditional notions of fair play and substantial justice when it purports to exercise *specific* jurisdiction over an out-of-state corporation based primarily on allegations that the corporation engaged in a substantial, continuous, and systematic course of business within the State. Yet that is precisely what the California Supreme Court is attempting to do in this case. Employing its sliding scale approach, the court declared that BMS's extensive business contacts with California substantially lessened any need for Respondents, in order to establish specific jurisdiction, to demonstrate a relationship between BMS's forum contacts and their claims. Pet. App. 22a.[5] Indeed, the Court indicated

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[5] The court explained its sliding-scale approach as follows: "The more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Ibid.*

that when the corporation's business contacts with California are wide-ranging, virtually *any* relationship between those contacts and the plaintiffs' claims will be sufficient to establish specific jurisdiction. *Ibid* ("Indeed, *only* when the operative facts of the controversy *are not related* to the defendant's contact with the state can it be said that the cause of action does not arise from that contact.") (emphasis added).

As the preceding quotations make plain, the California Supreme Court's sliding-scale approach is, in effect, an effort to exert all-purpose jurisdiction over BMS and other large, nationwide corporations by re-labeling the court's actions. What in a pre-*Daimler* world was categorized as an assertion of general jurisdiction over large corporations is now categorized as an assertion of specific jurisdiction. But the result is the same: under the decision below, California courts may assert personal jurisdiction over any large corporation that operates on a nationwide basis, even with respect to tort claims asserted by nonresident plaintiffs based on injuries incurred in other States.[6]

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[6] The alleged relationships between "the operative facts of the controversy" and the BMS forum contacts cited by the California Supreme Court—*e.g.*, the establishment of a nationwide marketing campaign directed from outside California that marketed Plavix both to California residents and to the nonresident Respondents, the existence of BMS research facilities in California that performed no Plavix-related research, a contractual relationship with a California-based distribution company that played no role in distributing Plavix to nonresident Respondents—are the sorts of relationships one would expect *any* large company to maintain if it engages in a substantial, continuous, and systematic course of business within California.

Subjecting a corporation to personal jurisdiction does not cease to offend traditional notions of fair play and substantial justice simply because the state court has re-labeled its action as an assertion of "specific jurisdiction" and (employing a "sliding scale" standard) has pointed to an insignificant relationship between the defendant's in-state activities and the claims asserted. Unless *Daimler*'s limits on subjecting a corporation to jurisdiction wherever it is "doing business" apply to both strands of personal jurisdiction, the important constitutional protections afforded out-of-state corporate defendants by *Daimler* will be rendered meaningless.

## III. THE CALIFORNIA SUPREME COURT'S TEST LACKS PREDICTABILITY AND THUS FAILS TO PROVIDE BUSINESSES WITH GUIDANCE REGARDING WHERE THEIR CONDUCT MAY RENDER THEM LIABLE TO SUIT

The Court explained in *Daimler* that it adopted its rule governing general jurisdiction over corporations in part because of its simplicity. Ascertaining a corporation's principal place of business and its place of incorporation—the attributes that *Daimler* held are determinative in assessing where a corporation is "at home"—is a relatively straightforward exercise:

> Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. Cf. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Simple jurisdictional rules . . . promote greater

> predictability."). These bases afford plaintiffs at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

*Daimler*, 134 S. Ct. at 760.

Numerous other decisions of the Court have stressed the importance of adopting straightforward, easy-to-administer rules governing federal court jurisdiction. For example, at issue in one recent case was whether a *parens patriae* lawsuit filed by Mississippi to recover damages suffered by its citizens qualified as a CAFA mass action, and thus fell within the district court's removal jurisdiction. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014). The Court stated that its holding—that individuals not named in a complaint could not be counted as CAFA "plaintiffs" (and thus that CAFA's 100-plaintiff jurisdictional threshold had not been achieved)—was based in part on its conclusion that a contrary holding would unduly complicate a district court's decision-making process on a jurisdictional issue—by requiring district courts to embroil themselves in numerous factual inquiries regarding the claims of individuals not named in the complaint. *AU Optronics*, 134 S. Ct. at 743-44. The Court stated that construing CAFA "plaintiffs" to include only named parties "leads to a straightforward, easy to administer rule." *Id.* at 744. It added, "Our decision thus comports with the commonsense observation that 'when judges must decide jurisdictional matters, simplicity is a virtue.'" *Ibid* (quoting *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013)).

By upholding personal jurisdiction under its expansive definition of specific jurisdiction, the California Supreme Court has adopted a jurisdictional rule that is anything but simple. Among other things, the court's "substantial nexus or connection test" establishes a sliding scale, under which a showing that the defendant has numerous forum contacts (regardless whether they are causally related to the claims asserted) reduces the required showing of a connection between those contacts and the plaintiffs' claim. Pet. App. 22a. But the unspecified degree of reduction is left to be resolved by California courts on a case-by-case basis. *Id.* at 35.

As a result, out-of-state corporations are left with little guidance regarding what activity in California will render them subject to the jurisdiction of California courts for claims arising outside the State. That result is inconsistent with *Daimler*'s goal of predictability and thus exacerbates due process concerns.

The court below did not dispute the highly attenuated nature of the relationship between California and the Respondents' claims. It nonetheless concluded that California courts could exercise specific jurisdiction over Respondents' claims based on a smorgasbord of BMS forum contacts. At no point did it specify which of those contacts, by themselves, would be sufficient to establish personal jurisdiction. Indeed, although the court noted that some Plavix-based products-liability claims have been filed by California residents against BMS based on theories similar to those raised by the nonresident Respondents, the court

never specified whether the existence of such claims was crucial to its personal-jurisdiction finding.

A rule so amorphous provides corporations with no guidance whatsoever. The California Supreme Court insists that the nonresident Respondents' claims "arise out of or are connected with" BMS's forum contacts, but BMS and other nonresident defendants are left to wonder precisely what that connection consists of. One plausible interpretation: manufacturers that market their products on a nationwide basis are subject to suit in each of the 50 States with respect to *any* claim arising out of the sale of their products. BMS is hardly unique among manufacturers in distributing its products pursuant to a nationwide distribution and marketing plan. But if this Court upholds the California Supreme Court's rule, little is left of *Daimler*; the Court will simply have substituted a new name (specific jurisdiction) for the exorbitant understanding of general jurisdiction it rejected in *Daimler* as too grasping.

As *Daimler* explained in rejecting the Ninth Circuit's expansive understanding of personal jurisdiction over nonresident defendants based on claims arising outside the forum, "Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King Corp. v. Rudzewicz* 471 U.S. at 472).

The court below dismissed those concerns, asserting that BMS "embraced th[e] risk" of being sued in California by nonresident plaintiffs when it decided to include California within its nationwide Plavix sales efforts. Pet. App. 33a. But it is unrealistic to expect large manufacturers to exclude California from their marketing efforts.[7] More importantly, the court's rationale is inconsistent with *Daimler*'s condemnation of "exorbitant exercises of all-purpose jurisdiction" by California courts based merely on evidence that the defendant engaged in continuous and systematic business activity within the State. The Court should establish a rule that provides clear guidance to the business community regarding the extent of forum contacts, beyond simply conducting business on a continuous and systematic basis, that is sufficient to expose companies to the specific jurisdiction of forum courts. The due-process requirement urged by BMS—a showing of a causal link between the defendant's forum contacts and the plaintiffs' claims—is a rule that would provide appropriate clarity to the business community, in addition to being consistent with this Court's due-process case law.

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[7] Moreover, it is not consistent with "traditional notions of fair play and substantial justice," *International Shoe*, 326 U.S. at 316, to require a company—in return for the privilege of marketing a product in a State—to agree to be answerable in the State's courts for 100% of the tort suits arising nationwide from that marketing effort. Rather, if a company's sales within a State amount to 3% of a product's nationwide sales, it should reasonably anticipate that roughly 3% of the tort claims arising from those sales will be filed in the State's courts.

## CONCLUSION

The Court should reverse the judgment of the California Supreme Court.

Respectfully submitted,

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March 8, 2017